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153-411

RECORD, CASE No. 15,365.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM No., 981.

THE CITY OF NEW ORLEANS, APPELLANT,

vs.

H. W. BENJAMIN ET AL.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

FILED JULY 31, 1893.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 1, 1893.

1 UNITED STATES OF AMERICA, } ss:
Fifth Judicial District, }

Be it remembered that on the 27th day of June, 1893, the same being a day of the November term, 1892, of the United States circuit court of appeals for the fifth circuit, begun and held in the city of New Orleans, State of Louisiana, there were present the Honorable A. P. McCormick, United States circuit judge for the fifth judicial circuit, presiding, and the Honorable James W. Locke, United States district judge for the southern district of Florida, when the following proceedings were had:

THE CITY OF NEW ORLEANS, Appellant,
v.
H. W. BENJAMIN *et als.*, Appellee.

H. W. BENJAMIN *et als.*, Appellants,
v.
THE CITY OF NEW ORLEANS, Appellee.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the eastern district of Louisiana and was argued by counsel.

Whereupon, the court desiring the instruction of the honorable the Supreme Court of the United States for the proper decision of the questions arising herein—

It is ordered that the following statement and questions of law be certified to said Supreme Court, to wit:

2 United States Circuit Court of Appeals for the Fifth Circuit.

THE CITY OF NEW ORLEANS, Appellant,
vs.
H. W. BENJAMIN *et als.*, Appellees.

H. W. BENJAMIN *et als.*, Appellants,
vs.
THE CITY OF NEW ORLEANS, Appellee.

No. 142.

The complainant, an alien, filed his bill of complaint in the circuit court against the city of New Orleans and other municipal corporations, citizens of the State of Louisiana, alleging, among other things, as follows, viz:

That by an act of the legislature of Louisiana (No. 74) approved September 14th, 1868, the parishes of Orleans (including the city of New Orleans), Jefferson, and St. Bernard were territori-ly united in one district for the purpose of police government therein, called the "Metropolitan police district of New Orleans, State of Louisiana;" that the government of said district for police purposes was vested in a board of commissioners styled "the board of Metropolitan police."

3 That said board was required to appoint all the officers and employees of the police force required in said district, and their salaries, which were prescribed by the act, were required to be paid monthly; that by said act and acts of said legislature supplementary to and amendatory thereof said board was required to make annually an estimate of the expenses of maintaining a police force in said district and to apportion the same to the several cities and parishes within said district, and said cities and parishes were required by said acts to promptly pay and to provide the means for promptly paying the amounts thus apportioned to them, and they were authorized and required to raise the amount by levying taxes for that purpose.

That said board of Metropolitan police, in obedience to the laws creating and governing the same, organized a Metropolitan police force in said district and appointed and employed the officers and members thereof, who entered upon their duties and rendered services under contracts therewith to be paid the salaries fixed by law for such employment, such contracts being made upon the faith of its revenues applicable to their payment being unimpaired.

That said board annually made the estimates of the expenses of maintaining such police force and apportioned the same to the several cities and parishes in the district, and that large sums are due and unpaid on account thereof by the city of New Orleans and other corporations made defendants in the bill.

4 That by the provisions of an act of said legislature approved February 27th, 1869, and subsequent acts all warrants issued in payment of salaries of officers, employees, and members of the Metropolitan police and for the expenses of said board were made receivable for all parish and municipal taxes and licenses within the limits of the Metropolitan police district and for all debts due or to become due to the parishes and cities within said district, not exceeding in any one year the amount of their respective apportionments for that year.

That by an act of said legislature (No. 35) approved March 31st, 1877, said act No. 74, of September 14th, 1868, establishing said Metropolitan police district; said act No. 44, of February 27th, 1869, making all warrants issued in payment of Metropolitan police salaries and expenses receivable for all municipal and parish taxes within the district; said act No. 94, of March 30th, 1870, requiring the several cities and parishes within the district to pay and to provide the means for the payment of their apportionments of the expenses of the board of Metropolitan police; said act No. 16, of March 24th, 1875, entitled "An act to enforce the payment by the city of New Orleans and the several cities and parishes of the Metropolitan police district of the apportionment made upon them by the board of Metropolitan police, and for other purposes," as well as all other acts amendatory of said above-enumerated acts or upon the

5 same subject-matter, were repealed, and said board of Metropolitan police was abolished and no provision was made for the liquidation of its affairs or the payment of its debts.

That said repealing act was in violation of section 10, article 1,

of the Constitution of the United States, in that it impaired the obligation of the contracts made by said board of Metropolitan police with its officers and employees and others to whom it was indebted and who had contracted with and rendered services to said board upon the faith of said provisions of law for the enforced payment and collection of the sums due to it as aforesaid from the several cities and parishes within said district, out of which funds only they could be paid, and to that extent said act was and is null and void.

The bill further avers that complainant is the holder and owner of Metropolitan police warrants, certificates, and claims against said board of Metropolitan police, said warrants and certificates having been issued by said board for services rendered and supplies furnished and said claims being for services rendered and supplies furnished thereto under contracts therewith, said warrants, certificates, and claims amounting to $5,032.90, and that other due and unpaid warrants and certificates issued by said board are outstanding, and sums are due and owing by it for services rendered
6 and supplies furnished to it exceeding $200,000.

And it is also averred—

"That the only assets of said board of Metropolitan police at the time it was abolished were the amounts due to it by the said city of New Orleans and by the other defendants as herein stated; that the aggregate amount of said indebtedness to said board largely exceeds the total amount of its debts and liabilities; that law and equity require that the amount of said assets should be ascertained and the just proportion due by each of the defendants adjusted, and that the liabilities of said board of police be fixed and determined and paid out of said assets, and if the same exceed the liabilities of the board that said defendants be required to pay their *pro rata* shares thereof."

"That said board of Metropolitan police was a body corporate under the laws of its creation, and by the repeal of said laws ceased to be, and had and has no representative or successor against whom suit might have been or may now be brought for the establishment of the demands of the complainant herein, and he is remediless except in this honorable court, where matters of this nature are cognizable and relievable; wherefore he brings this his bill in behalf of himself and all other creditors of said board similarly situated who may come in and contribute to the expenses of this suit."

7 The prayer of the bill in substance is that an account be taken "of all the debts, liabilities, and unpaid dues of every kind of said board of Metropolitan police, including the warrants, certificates, and claims of your orator and of all others who may come in and avail themselves of the decree to be made herein and contribute to the expense of this suit; that a like account may be taken of the amount due by each of said defendants to said board of Metropolitan police for the balances of their unpaid apportionments of police expenses, as well as of all police taxes collected by them and withheld from said board, and that said defendants be decreed to pay into the hands of some discreet person, to be appointed re-

ceiver by this honorable court, their several *pro rata* shares of the amount so found to be due to creditors of said board of Metropolitan police, including all costs of the administration thereof, and that the funds thus realized be applied to the payment of your orator's said warrants, certificates, and claims and of such other persons as may be creditors of said board and who shall come in and establish their claims, and also to the payment of interest thereon and all expenses of administration and costs." The defendant The City of New Orleans demurred to the bill, assigning, among other causes of demurrer, the following:

"That the complainant's said bill of complaint, in case the same were true, which this defendant does in nowise admit, contains not any matter of equity whereon this court can ground any
8 decree or give the complainant any relief or assistance as against this defendant."

"That the bill complains of the repeal by the legislature of Louisiana of the aforesaid acts organizing and relating to the Metropolitan police force and the Metropolitan police board, and by reason of said repeal the bill alleges the Metropolitan police board was abolished and no provision was made or now exists for the liquidation of the affairs or for the payment of the alleged debts of said board, and the bill calls upon this court to grant relief for the payment of said alleged debts of said Metropolitan police board; but this defendant shows that the only mode of payment of said alleged debts, if any, of the late Metropolitan police board, a political body for the administration of the police of the city, is by taxes to be levied for that purpose, and, if it be true, as asserted by said bill, that no provision now exists for the payment of said debts, this court has no power to direct the levy of taxes for said asserted debts or any power whatever to grant any relief in respect to the matters of which the bill complains."

The demurrer was overruled.

Said defendant then filed an answer and, among other things, averred as follows:

"Further answering, defendant admits that by the act of the legislature of Louisiana No. 35, of 1887, the various acts organizing the Metropolitan police board were repealed; but all the pro-
9 visions for the payment of said Metropolitan police was the levy of the Metropolitan police taxes authorized by law, and said taxes had already been levied far in excess of taxes that should have been imposed, and the repealing legislation did not interfere in any manner with the levy and application of said taxes to the extent that they could be collected to the payment of the legal obligations of said Metropolitan police board, and with this statement and a reference to said repealing act this defendant denies the allegation in the bill that, by such repealing legislation, no provision was made for the liquidation of the affairs of said board or payment of its debts."

This defendant again affirms that said repealing act did not interfere in any manner with the means of payment of all lawful obligations of said board nor with the right of those who had made

lawful contracts—that is, to the extent authorized by law with said board; and this defendant again refers to the illegal and void apportionments of said board and to the alleged contracts made by it far in excess of the means applicable to the support of the Metropolitan police and far in excess of their power, and denies to be true that said repealing act was in violation of the Constitution of the United States or "impaired the obligation of the contracts of said board with its officers and employees who had contracted with and rendered services to said board upon the faith of said provisions of law for the enforced payment and collection of the sums due to it from the several cities and parishes within said district," and denies that said act was null and void in any respect or to any extent.

10 Said answer also averred that the city was liable to said board only for such police taxes as she collected, and that she had fully accounted for all such collections, and denies that she is now making any such collections and that any such taxes are collectable.

Issue being joined, the case was referred to a master to take an account of the amounts due by the defendants to said board and of its outstanding liabilities. He reported as due by the city of New Orleans on account of its apportionments a balance of $241,106.54 and an indebtedness of the board incurred on account of said city and still unpaid amounting to $123,963.05, besides interest thereon. Small amounts were found due by the other defendants and also by the board on their account.

Prior to the decree a number of creditors of the board, some of whom were citizens of Louisiana, with leave of court intervened in the suit, made proof of their claims before the master, claimed the benefit of the decree, and prayed to be permitted to share in the distribution.

Of the amount of claims proved before the master and covered by the decree the complainant, an alien, holds $5,777.78; an alien intervenor holds $815.78; intervenors who are citizens of Louisiana hold $81,100.51, and intervenors whose citizenship does not appear hold $30,302.16. Other claims, amounting to $13,363.21, were proved before the master by persons whose citizenship does not appear and who have not intervened.

11 And it appearing that complainant and intervenors were assignees of the certificates, warrants, and claims, of which they made proof before the master, and that their assignors were citizens of Louisiana, and there being no averment in the bill that the assignors might have sued thereon in the circuit court if no transfer thereof had been made, the city of New Orleans moved to dismiss the suit for want of jurisdiction in said court.

The motion was denied and a final decree made requiring the defendants to pay their virile shares of the indebtedness of the board as reported by the master. From such decree an appeal was taken to this court, and the case came on to be heard upon the errors assigned; whereupon, the court desiring the instruction of the honorable the Supreme Court of the United States for the proper decis-

ion of the questions arising herein touching the jurisdiction of the circuit court, it is hereby ordered that the following questions and propositions of law be certified to said Supreme Court in accordance with the provisions of section 6 of the act entitled "An act to establish circuit courts of appeals and define and regulate in certain cases the jurisdiction of the circuit court of the United States and for other purposes," approved March 3, 1891, to wit:

First. Does the case made by the bill alleging that the board of police has been abolished and left without successor or legal representative and no provision has been made for the application
12 of its assets to the payment of its debts and the answer herein constitute a suit in equity arising under the Constitution of the United States and within the jurisdiction of the circuit court of the United States for the eastern district of Louisiana without regard to the diverse citizenship of the parties?

Second. The warrants and the certificates held by the complainant having been issued for services rendered and supplies furnished under contract with the board of Metropolitan police when the laws required said warrants and certificates to be received by the defendants in payment of all licenses, taxes, and other dues, and all such laws having been repealed by the legislature of Louisiana without making other provision for the redemption of said warrants and certificates, was this an impairment of the obligation of the contract in relation to such warrants and certificates within the meaning of art. 1, sec. 10, of the Constitution of the United States?

Third. Do the pleadings show a suit to recover the contents of choses in action within the meaning of the judiciary act of 1887 and 1888, so as to preclude the complainant, as assignee, from suing in the circuit court of the United States to establish a fund out of which he, in common with other creditors of the late Metropolitan police board, may be paid *pro rata* upon their claims?

Fourth. Considering all the allegations in the bill of complaint and the provisions in the constitution and laws of Louisiana
13 respecting the Metropolitan police board and the Metropolitan police warrants and certificates and the redemption and payment of said certificates, does the case show a liability on the part of the city of New Orleans to contribute to a fund for the payment of said warrants and certificates beyond its liability for taxes assessed and collected in pursuance of the apportionments made?

And it is further ordered that the bill of complaint and the demurrer and answer of the city of New Orleans thereto be made a part of the transcript certifying the aforesaid questions, together with the following sample copies of the warrants, certificates, payrolls, and assignments forming the basis of complainant's demand, to wit:

Warrant Filed with and Part of Assignment.

(Copy.)

Central department, Metropolitan police.

(No. 10253.)

NEW ORLEANS, *May 18th*, 1874.

Treasurer of the board Metropolitan police:

Pay to the order of James Reilly, fifty $\frac{00}{100}$ dollars.
By order of the board.

$50.00. (Signed) E. PARKER,
Chief Clerk.

Certificate Filed with and Part — Assignment.

(Copy.)

Central department, Metropolitan police.

No. 4748. $73.97.

NEW ORLEANS, *Jan.* 13, 1876.

This is to certify that the board of Metropolitan police is indebted to P. Moran, No. 22, first precinct, in the sum of seventy-three $\frac{97}{100}$ dollars, for salary for account of the month of December, 1875.

(Signed) L. T. MURDOCK,
Treasurer Board Metropolitan Police.

The amount due as per this certificate will not be paid unless the certificate is delivered to the treasurer of the board.

Pay-roll of police of the third precinct of the Metropolitan police district.

Received, New Orleans, —— —, 187–, from the treasurer of the Metropolitan police, the amount opposite our respective names, being in full for services rendered as members of the Metropolitan police for the month of December, 1876.

Names.	Nos.	Grade.	Time—days.	Rate per annum.	Am'nt.		Stoppages.						Total amount of stoppages.		Net amo'nt.		Receipts.	Remarks.
							Fines.		Uniforms.		Lost property.							
J. Krucker.	147	Patrolman..	11	$1,000	30	05	2	73	..	..	..	..	2	73	27	32	.....	Absent: Sick, 12 days; with leave, 1 day; without leave, 7 days; fined, 1 day. Dec. 11, 1876.

Approved for the sum of forty-nine hundred and seventy-six $\frac{4}{100}$ dollars.
N. O., January 5, 1877.
(Signed) JAMES LEWIS,
Committee on Account.

(Signed) J. H. LAWLER,
Capt. Commanding 3d Precinct.

Approved:
(Signed) W. F. LOAN,
Sup't Met. Police.

Approved by the board.
January 5, 1877.
(Signed) WM. MYERS,
Chief Clerk.

Bill of Complaint. Filed February 9th, 1891.

To the judges of the circuit court of the United States for the eastern district of Louisiana:

Henry W. Benjamin, of New Orleans, an alien and a subject of the Kingdom of Great Britain, brings this his bill against the city of New Orleans, a municipal corporation, created by the laws of the State of Louisiana and a citizen of said State; the city of Kenner, also a municipal corporation created by the law of and a citizen of said State, the police jury of the parish of Jefferson and the police jury of the parish of St. Bernard, political corporations created by the laws of and citizens of said State. And, thereupon, your orator complains and says:

1st. That by an act of the legislature of Louisiana (No. 74) approved September 14th, 1868, the parishes of Orleans, Jefferson, and St. Bernard, were territorily united in one district for the purpose of police government therein, called the "Metropolitan police district of New Orleans, State of Louisiana;" that the government of said district for police purposes was vested in a board of commissioners, styled "The board of Metropolitan police."

2d. That said board was required to appoint all the officers and employees of the police force, required in said district, and their salaries which were prescribed by the act, were required to be paid monthly; that by said act and acts of said legislature, supplementary to and amendatory thereof, said board was required to make, annually, an estimate of the expenses of maintaining a police force in said district, and to apportion the same to the several cities and parishes, within said district, and said cities and parishes were required by said acts, to promptly pay, and to provide the means for promptly paying the amounts thus apportioned to them.

3d. That said city of New Orleans was a municipal corporation created by the laws of said State of Louisiana, and was within said Metropolitan police district; that said board from and after its creation, as aforesaid, annually made the estimate of expenses of maintaining said Metropolitan police, and apportioned the same to said several cities and parishes as required by said acts.

4th. That the apportionments made by said board, as aforesaid, to the city of New Orleans, were as follows, viz:

For the year 1869	$877,595 00
For the year 1870	838,274 07
For the year 1871	809,932 19
For the year 1872	724,460 90
For the year 1873	718,017 00
For the year 1873, additional	203,600 65
For the year 1874	713,208 40
For the year 1874, additional	182,886 53
For the year 1875	587,723 00
For the year 1876	500,000 00
Total	$6,155,697 74

And when said apportionments were made and notified, as they were, to said city, she became liable to said board of Metropolitan police for the amount thereof.

5th. That like apportionments of police expenses, were made by said board to the cities of Jefferson and Carrollton, which were within said police district, for which apportionments, they each became liable to said board, but afterwards, by acts of said legislature, said cities were consolidated with the city of New Orleans, which, by said acts of consolidation was made liable for their debts, including those created for their apportionment of police expenses aforesaid.

Your orator has not sufficient information to state the amount of the liabilities thus created, and imposed upon said city of New Orleans, but avers, upon information and belief, that it was sufficient to pay and discharge the proportion of police expenses due by each of said cities.

6th. That like apportionments were made by said board, of police expenses to be paid by said parishes of Jefferson and St. Bernard, and the city of Kenner, all within said police district, and notice given to each of said corporations thereof, as required by law, and thereupon they became and were absolutely liable to said board for the amount of their respective apportionments; but what the amounts of said apportionments were, complainant is unable to state, but avers that they were sufficient to meet the annual police expenses within their respective jurisdictions.

7th. That while said cities and parishes, within the police district, were required to "promptly pay, and to provide the means for promptly paying" their respective apportionments, the councils of said cities and the police juries of said parishes were authorized to raise the amounts required for that purpose, by levying taxes upon the persons and things subject to taxation, within their respective jurisdictions, and for that purpose did severally make such levies, but whether for sufficient amounts to meet their respective liabilities, complainant is unable to state; but he avers that said city of New Orleans, annually, during the whole period of the existence of said board, included in her budget of expenditures the amount thus apportioned to her, and in pursuance of said authority, levied taxes for the purpose of paying the same; and collected and paid upon account of her apportionments, large sums of money, but not enough to discharge her liability in the promises; there still being due upon account thereof the sum of nine hundred and forty thousand three hundred and seventy-nine and $\frac{60}{100}$ dollars; and the defendant, the present city of New Orleans, successor of said city, as existing at the time said apportionments were made is liable therefor.

16 8th. That by the provisions of an act of said legislature approved February 7th, 1869, and subsequent acts, all warrants issued in payment of salaries of officers, employees and members of the Metropolitan police and for the expenses of said board, were made receivable for all parish and municipal taxes and licenses, within the limits of the Metropolitan police district, and for all debts due, or to become due to the parishes and cities within said

district, not exceeding in any one year the amount of their respective apportionments for that year.

9th. That said board of Metropolitan police, in obedience to the laws creating and governing the same, organized a Metropolitan police force in said district, and appointed and employed the officers and members thereof, who entered upon their duties and rendered services, under contracts therewith, to be paid the salaries fixed by law for such employment, such contracts being made upon the faith of its revenues applicable to their payment being unimpaired.

10th. That by an act of said legislature (No. 35) approved March 31st, 1877, said act No. 74 of September 14th, 1868, establishing said Metropolitan police district; said act No. 44 of February 27th, 1869, making all warrants issued in payment of Metropolitan police salaries and expenses, receivable for all municipal and parish taxes within the district; said act No. 94 of March 30th, 1870, requiring the several cities and parishes within the district, to pay and to provide the means for the payment of their apportionments of the expenses of the board of Metropolitan police; said act No. 16 of March 24th, 1875, entitled "An act to enforce the payment by the city of New Orleans and the several cities and parishes of the Metropolitan police district of the apportionment made upon them by the board of Metropolitan police, and for other purposes," as well as all other acts amendatory of said above-enumerated acts, or upon the same subject-matter, were repealed; and said board of Metropolitan police was abolished, and no provision was made for the liquidation of its affairs or the payment of its debts.

11th. That said repealing act was in violation of section 10, article 1 of the Constitution of the United States, in that it impaired the obligation of the contracts made by said board of Metropolitan police, with its officers and employees, and others, to whom it was indebted, and who had contracted with and rendered services to said board, upon the faith of said provisions of law for the enforced payment and collection of the sums due to it as aforesaid, from the several cities and parishes within said district, out of which funds only, they could be paid and to that extent said act was and is null and void.

12th. That said city of New Orleans, has from day to day and from year to year, ever since the passage of the repealing act of March 31st, 1877, aforesaid, continued to collect the taxes levied as aforesaid, for the purpose of paying the apportionments of said city for police expenses, as aforesaid made, and notified thereto; and is now making such collections, and enforcing the payment of taxes levied for that purpose, and now has a large sum of money thus realized, which is applicable to the payment of said city's indebtedness to said board of police, and ought to be distributed among the creditors of said board, in reduction of their claims, including those of your orator.

13th. That said board of Metropolitan police was a body corporate under the laws of its creation, and by the repeal of said laws, ceased to be, and had and has no representative or successor, against whom suit might have been or may now be brought for the establishment

of the demands of the complainant herein, and he is remedi-
17 less, except in this hon. court were matters of this nature are cognizable and relievable; wherefore he brings this his bill in behalf of himself and all other creditors of said board, similarly situated who may come in and contribute to the expenses of this suit.

14th. That said board being abolished, and without any succession or representative as aforesaid, and said city of New Orleans having collected a large sum of money, to wit: the sum of $—, raised by taxation for and applicable to the payment of its apportionments of police expenses for the year- 1874, 1875 and 1876, Abraham Brittin, a creditor of said board of Metropolitan police applied to the civil district court for the parish of Orleans, Louisiana, for the appointment of a receiver of said board for said funds and said city consenting thereto, by the order and decree of said court, Richard F. Harrison was appointed such receiver; that in such capacity he brought suit against the city of New Orleans for the recovery of such taxes as had been collected by the city, for said years, for account of said Metropolitan police board, and by the judgment of the supreme court of Louisiana (40 Louisiana Annual Reports, page 512) recovered from said city upon that account, the sum of $30,944.94, and afterwards, to wit: the — day of July, 1888, said city paid to said receiver the amount of said judgment, the proceeds whereof, said receiver on the 25th day of July, 1888, paid to and distributed among the holders of claims against said board, and afterwards said city voluntarily paid to said receiver without suit, sundry other small sums derived from the collection of such taxes for the purpose of having the same applied to the payment of the liabilities of said board, but the amount of such payments is unknown to complainant, but upon information and belief, he avers, that it does not exceed one thousand dollars. And complainant further shows that afterwards, to wit: on the 27th day of December, 1890, said Harrison died, and afterwards Joseph P. Hornor was appointed receiver in his stead, but his appointment was rescinded before he acted, and said board of Metropolitan police is now without any successor or legal representative, and its affairs are no longer under any administration whatsoever.

15th. That one, Lew Goldstein, as holder of a large amount of Metropolitan police warrants, issued to officers and members of the Metropolitan police, and as assignee of sundry creditors of said board of Metropolitan police, on the 21st of October, 1886, brought suit in the 26th judicial district court, in and for the parish of Jefferson, Louisiana, against all the corporations made defendants herein in behalf of himself and all other creditors of said board, similarly situated, praying the appointment of a receiver, and the enforcement of the liabilities of said several defendants for the purpose of paying and discharging the obligations of said board, and citations were served on the 26th October, upon each of said defendants, to appear and answer in said suit, and afterwards said suit was removed into this hon. court, where holders of warrants and claims against said board amounting to $— appeared before the master,

under the orders of the court, and proved their demands, as will appear by said master's report now on file, which is here referred to for greater certainty; that the case as against the city of New Orleans, was afterwards dismissed upon the ground that this court had not acquired jurisdiction thereof, but as to all the other defendants the same still remains pending and undisposed of.

16th. That your orator is the holdor and owner of Metropolitan police warrants, certificates, and claims against said board of Metropolitan police, said warrants and certificates having been issued by said board for services rendered, and supplies furnished, and said claims being for services rendered and supplies furnished thereto, under contracts therewith, a list of said warrants, certificates
18 and claims amounting to $5,032.90 being annexed hereto as Exhibit A and made part of this bill; that all of said warrants, certificates and claims were included among those held and sued upon by said Lew Goldstein, in his above-named suit, your orator having since acquired the same which still remain due and unpaid.

17th. And your orator further shows and avers, that there are now outstanding, due and unpaid warrants and certificates issued by said board of Metropolitan police, and sums due and owing by it, for services rendered and supplies furnished thereto, a large amount, the exact sum thereof being unknown to your orator, but he avers upon information and belief, that including interest thereon, the amount exceeds two hundred thousand dollars; that said several cities and parishes within the police district being required by law to receive in payment of all taxes and licenses and debts due to them, the warrants issued by said board as aforesaid, and by the act of the legislature No. 33, approved February 26th, 1874, all restrictions upon the amount to be so received were removed; and it is claimed by the city of New Orleans, that in consequence thereof she received more of such warrants in payment of her taxes, than her just proportion. And your orator avers, that the only assets of said board of Metropolitan police, at the time it was abolished, were the amounts due to it by said city of New Orleans, and by the other defendants, as herein stated; that the aggregate amount of said indebtedness to said board largely exceeds the total amount of its debts and liabilities; that law and equity require that the amount of said assets should be ascertained, and the just proportion due by each of the defendants adjusted, and that the liabilities of said board of police be fixed and determined, and paid out of said assets; and if the same exceed the liabilities of the board, that said defendants be required to pay their *pro rata* shares thereof.

In consideration whereof and inasmuch as your orator has not a complete and adequate remedy at law; to the end therefor-, that the said defendants may, if they can show why your orator should not have the relief hereby prayed, and that they and each of them, may full, true and perfect answer make, to all and singular the premises, (but not under any oath, the same being waived) that an account may be taken under the direction of this hon. court, be-

fore one of the masters thereof, or otherwise as the court may direct, of all the debts, liabilities and unpaid dues of every kind, of said board of Metropolitan police including the warrants, certificates and claims of your orator, and of all others who may come in and avail themselves of the decree to be made herein, and contribute to the expense of this suit; that a like account may be taken of the amount due by each of said defendants to said board of Metropolitan police for the balances of their unpaid apportionments of police expenses, as well as of all police taxes collected by them, and withheld from said board; and that said defendants be decreed to pay into the hands of some discreet person, to be appointed receiver by this hon. court, their several *pro rata* shares of the amount so found to be due to creditors of said board of Metropolitan police, including all costs of the administration thereof, and that the funds thus realized, be applied to the payment of your orator's said warrants, certificates and claims, and of such other persons as may be creditors of said board, and who shall come in and establish their claims, and also to the payment of interest thereon, and all expenses of administration and costs.

19 May it please your honors to grant unto your orator, writs of subpœna directed to said city of New Orleans, to said city of Kenner, to said police jury of the parish of Jefferson, and to said police jury of the parish of St. Bernard, all municipal corporations of the State of Louisiana, therein and thereby commanding them and each of them on a day to be named and under a certain penalty therein specified, to be and appear in this hon. court, then and there to answer all and singular the premises, and to stand to, abide and perform such order and decree as to your honors shall seem meet.

And your orator prays such other and further and general relief as the nature of the circumstances of the case may require, and as to equity and good conscience may be agreeable.

And your orator will ever pray, etc.

(Signed) ROUSE & GRANT,
Solicitors for Complainant.

(Signed) CHAS. LOUQUE, *Of Counsel.*

Demurrer of City of New Orleans. Filed April 30th, 1891.

HENRY W. BENJAMIN
versus
THE CITY OF NEW ORLEANS. } United States Circuit Court. No. 11983.

This defendant, The City of New Orleans, by protestation not confessing or acknowledging all or any of the matters in and by the said bill set forth and complained of to be true in manner and form as the same are therein and thereby set forth and alleged, says: it is advised that there is no matter or thing in the complainant's said bill of complaint contained, good and sufficient in law to call this defendant to account in this honorable court for the same;

but that there is good cause of demurrer thereunto, and it does demur thereunto accordingly, and for causes of demurrer, says:

That the complainant's said bill of complaint, in case the same were true, which this defendant does in nowise admit, contains not any matter of equity, whereon this court can ground any decree or give the complainant any relief or assistance as against this defendant.

And for further cause of demurrer, this defendant shows:

That the complainant by his said bill of complaint seeks to enforce the asserted liability of the city of New Orleans to the Metropolitan police board and alleged creditors, arising out of apportionments to and against the city of New Orleans for its share of the expenses of the Metropolitan police, which apportionments the bill alleges were made by said board, and that the city thereby became bound to pay the amounts thereof, under and by reason of the legislative acts of the legislature of Louisiana, creating said Metropolitan police board and district, to wit: act No. 74 of 1868, section 28, *et seq.*, act No. 92 of 1869, sections 25, 26, 27, *et seq.*, and other acts on the same subject, and special reference is made to said acts and said sections thereof, to show the character of the asserted liability, if any, the bill alleges to have been imposed by said acts, on the city of New Orleans.

For further cause of demurrer, this defendant shows:

20 That the bill complains of the repeal by the legislature of Louisiana of the aforesaid acts organizing and relating to the Metropolitan police force and Metropolitan police board, and by reason of said repeal the bill alleges the Metropolitan police board was abolished and no provision was made or now exists for the liquidation of the affairs or for the payment of the alleged debts of said board, and the bill calls upon this court to grant relief for the payment of said alleged debts of said Metropolitan police board; but this defendant shows that the only mode of payment of said alleged debts, if any, of the late Metropolitan police board a political body for the administration of the police of the city, is by taxes to be levied for that purpose, and if it be true as asserted by said bill, that no provision now exists for the payment of said debts, this court has no power to direct the levy of taxes for said asserted debts, or any power whatever to grant any relief in respect to the matters of which the bill complains.

Wherefore, and for divers other errors and defects in the complainant's said bill of complaint contained, and appearing on the face thereof, this defendant does as aforesaid, demur in law thereunto, and humbly crave the judgment of this honorable court, whether it is compellable or ought to make any answer thereunto otherwise than as aforesaid.

And this defendant humbly prays to be hence dismissed with costs.

(Signed) CARLETON HUNT,
HENRY C. MILLER,
Solicitors for Defendant The City of New Orleans.

We hereby certify that in our opinions the above demurrer is well founded in point of law.

(Signed) CARLETON HUNT.
HENRY C. MILLER.

Joseph A. Shakspeare, mayor of New Orleans, deposes and says: That the above demurrer is not interposed for delay.

(Signed) JOSEPH A. SHAKSPEARE, *Mayor.*

Sworn to and subscribed before me, this 29th day of April, 1891.

[SEAL.] (Signed) CAS. H. SHIELDS,
Notary Public.

Answer of City of New Orleans. Filed May 16th, 1891.

HENRY W. BENJAMIN
versus
CITY OF NEW ORLEANS *et als.* } United States Circuit Court. No. 11983.

The answer of The City of New Orleans, one of the defendants herein.

This defendant, the said City of New Orleans saving and reserving to itself now and at all times all manner of advantage
21 and benefit of exception and otherwise that can be had and taken to the many errors, uncertainties and insufficiencies in complainant's bill contained, for answer thereunto, or unto so much and such parts thereof as is material for this defendant to make answer unto; answers and says:

This defendant shows that on the 21st of April, 1885, R. F. Harrison as receiver of the Metropolitan police board, instituted suit against this defendant in the civil district court for the parish of Orleans, for the same cause of action as stated in the bill, that is the asserted liability of this defendant for the apportionments against it by the board of Metropolitan police, and the alleged liability of this defendant for Metropolitan police taxes levied under the legislative acts organizing the Metropolitan police board and district, that in said suit there was a final determination of said cause of action by the judgment of the supreme court of the State rendered on the 11th of May, 1888, on the appeal taken by this defendant, which final judgment determined that defendant was liable to the Metropolitan police board and to the receiver thereof for and by reason of said cause of action, in the sum of thirty thousand nine hundred and forty-four dollars with interest, and no more, which judgment was satisfied by this defendant and all controversy respecting the cause of action aforesaid now asserted by complainant was thus ended and closed; all of which more fully appears by the record of said suit of R. F. Harrison, receiver, *vs.* The City of New Orleans, No. — of the docket of the civil district court, and the aforesaid final judgment of the supreme court thereon, to which special reference is made for fuller explanation and greater certainty, and this defendant shows that said receiver represented in

said suit all the alleged creditors of the Metropolitan police board, and if the complainant has any claim whatever against said board, he in common with other alleged creditors, was represented by said receiver in said suit, and said final judgment is binding and conclusive upon the complainant and all others claiming to be creditors of the Metropolitan police board, and said judgment is now pleaded and relied on as *res judicata* against plaintiff's demand, and this defendant prays that the same effect be given to the said *res judicata* as if pleaded separately to the bill of complaint.

And this defendant further brings to the notice of the court, that the matters and things alleged in complainant's bill, in case the same were true which is in nowise admitted but denied, that relief in respect thereto would have to be sought at law and not in equity.

And without prejudice and subject to the defences hereinbefore presented and again insisted upon, this defendant further answering admits that the act of the legislature of Louisiana, No. 74 of 1868 was as stated in the first article of the bill and special reference is made to said act to more particularly show its character.

This defendant further answering admits that by said act, the board of Metropolitan police thereby created, was required to appoint and fix the salaries of the police force requisite in the Metropolitan police district organized by said act, and this defendant shows that at the date of said act and during the entire period of the existence of said Metropolitan police force and district, the power of taxation of the city of New Orleans for all purposes was limited by law, and only the just proportion of the said taxes collected by the city, could be or was required to be applied to the support of the Metropolitan police and this defendant admits that subject to that limitation said Metropolitan police board was required to apportion the share of the expense of the Metropolitan police to be borne by the city of New Orleans not to be in
22 excess of said proportion applicable to the support of the said Metropolitan police, that to this end the Metropolitan police board was required by said act to make an annual estimate of the expenses of maintaining the Metropolitan police force in said district, and to apportion the same to the city and parishes composing said district, and further answering defendant shows that the city of New Orleans had at no time nor has it now any resources to pay the expenses of its police establishment save the funds derived from the taxes provided by law, and further answering defendant shows it was by said act and other acts amendatory thereof, required that the city levy annually the Metropolitan police taxes for the support of the Metropolitan police force in accordance with such legal apportionments against the city for its share of the expenses of said police establishment as said board might make, subject to the aforesaid limitation on the board restricting such apportionments to that amount only and no more, susceptible of being applied to the said police expenses, and said city was required by said acts up to the amount of said legal and limited apportionments, to receive in payment of all taxes due to it, Metropolitan police warrants issued by said board for the salaries of its officers and other expenses, and the

city was not liable or accountable for or required to make any payment of said apportionments or any part thereof, save from and out of the amount of and to the extent only of said Metropolitan police taxes actually collected, to be accounted for or paid by the city in cash or by said Metropolitan police warrants received by it, and save and except the levy and proper efforts to collect said Metropolitan police taxes and to pay over and account for in the manner stated, said taxes to the extent collected, no other obligation whatever was imposed by said acts, and this defendant denies to be true that by said act the city was required to pay or to provide the means for payment of the amounts apportioned by said board save and except said obligation to account for Metropolitan police taxes actually collected as this defendant has herein set forth.

This defendant further answering shows that for the years 1869 to 1876 both inclusive, the limitation of taxation for all purposes authorized by law to be imposed, was from one and a half to two per centum on every one hundred dollars of valuation; that the assessed valuation of all property of the city of New Orleans subject to taxation for said period did not exceed one hundred and twenty million of dollars, that the legal and necessary expenses of the Metropolitan police force in said years, did not require more than three hundred thousand dollars, and by reason of the aforesaid limitation of taxation it was not competent for said Metropolitan police board in any of said years to apportion against the city for its share of the expenses of said Metropolitan police more than three hundred thousand dollars and any apportionment in any of said years in excess of said amount was illegal and void to the extent of said excess; this defendant has no knowledge, information or belief whether or not the apportionments alleged in the bill were made by the Metropolitan police board, but if made each and every one of such apportionments are palpably in excess of the amount required or susceptible of being apportioned against this defendant for the support of said Metropolitan police, and said apportionments for each and every one of said years was illegal, void and null to the extent of the aforesaid excess whether or not said apportionments were ever notified this defendant has no knowledge, information or belief, but said notification if given was void and null the same as the apportionments themselves, and this defendant
23 again denies to be true that this defendant became or is or ever was liable to said Metropolitan police board for the amount of said apportionments, or for any part thereof, but in fact the only liability of the city to said Metropolitan police board was as this defendant has set forth and no further.

This defendant believes it to be true that apportionments were made by the said board against the towns of Jefferson and Carrollton within said Metropolitan police district, but at the period of said apportionments the power of taxation of each of said towns was limited, and there was no power in said board to apportion to said towns a greater amount than was capable of being devoted to the support of the police from limited taxation, that the apportionments against said towns was far in excess of said amount that said towns

could apply to police purposes, and beyond the power of the board to impose and illegal and void to the extent of the amount capable of being apportioned, and this defendant denies to be true that said towns or either ever became liable for said apportionments. Defendant admits the city of New Orleans was liable to said Metropolitan police board to the extent of said Metropolitan police taxes actually collected, but no further, and admits that the acts of consolidation made the city of New Orleans liable for the legal debts of the town- of Jefferson and Carrollton, but not for said illegal apportionments against said towns nor for any amount whatever to said Metropolitan police board, save to the extent of said Metropolitan police taxes actually collected, all of which have long since been accounted for, and with this statement this defendant denies "that by said acts of consolidation, the city of New Orleans was made liable for the debts of said towns including those created for their apportionments for police expenses aforesaid," save the liability as this defendant -as set it forth other than which none ever existed.

Further answering this defendant shows that it has already set forth in this answer all said acts required of said defendant and subject to the allegations in this answer in that regard defendant denies to be true that it was required to pay or provide the means of payment of the aforesaid apportionments of said board, but on the contrary defendant again affirms that its sole obligation was to levy within the limits hereinbefore stated and to pay over said Metropolitan police taxes as might be actually collected and no more, and this defendant admits that under said act it was authorized to levy the Metropolitan police taxes to an amount sufficient to meet the legal apportionments of said Metropolitan police board, but had no power to levy taxes for the aforesaid excessive and illegal apportionments, that this defendant did levy for each of the years of the existence of said Metropolitan police board, Metropolitan police taxes greatly in excess of such taxes that could legally have been levied, and it is true that the city of New Orleans during the existence of said board did undertake to include in her annual budgets certain amounts stated in the annexed exhibit alleged to be for said apportionments, but each of said amounts was far in excess of the amount that could be legally apportioned and was void and of no effect, and save as stated, defendant denies to be true that said city of New Orleans annually during the whole period of the existence of said board included in her budget of expenditures, the amount apportioned to her by said police board, and in pursuance of said authority levied taxes for the purpose of paying the same.

And defendant further answering, shows that in due course it collected a large portion of the Metropolitan police taxes, part in cash and part received in said Metropolitan police warrants directed to be received by the city under the restrictions hereinbefore stated for taxes due to it, and this defendant in regular course of said Metropolitan police taxes were collected, made large payments and settlements to and with said board of Metropolitan police through its proper representative, and R. F.

24

Harrison the receiver of said Metropolitan police taxes, and this defendant liable only for the amounts of said taxes actually collected and for no more, the amount thereof being shown by the exhibit herein filed, this defendant shows that by the receipt of said Metropolitan police warrants in payment of taxes due and by said settlements and payment to said board and subsequently to said receiver, has fully discharged said liability and accounted for all said Metropolitan police taxes ever collected in cash or in said Metropolitan police warrants, the said Metropolitan police warrants and said payments and settlements aggregating in fact an amount in excess of all said Metropolitan police taxes ever collected, and the amount of said taxes collected for the years 1868 to 1876, inclusive, the amount of said Metropolitan police warrants received, and the amounts of said payments and settlements by this defendant of said collected taxes with all the particulars relative thereto is herewith filed, to which special reference is made for fuller explanation and greater certainty; and this defendant save and except and subject to what is stated herein, denies to be true that it collected and paid upon account of said apportionments large sums of money, but not enough to discharge her liability in the premises, or that there is still due upon account thereof the sum of nine hundred and forty thousand three hundred and seventy-nine dollars and sixty cents or any part thereof, or that defendant, the present City of New Orleans, the successor of the city as existing at the time of said apportionments were made, is liable for said amount or any part thereof, but on the contrary this defendant shows its full discharge of all its liability to said Metropolitan police board arising out of said acts, and instead of there being any indebtedness to said Metropolitan police board or arising out of said apportionments, in point of fact this defendant has more than discharged all liability in the premises, and there is not a dollar of said pretended indebtedness alleged in the bill.

Defendant further answering admits that by the acts of the legislature of Louisiana No. 69 of 1869 and No. 41 of 1870 regular session, Metropolitan police warrants for the payment of salaries of the officers, employees and other expenses of the board of Metropolitan police were made receivable for all parish and municipal taxes and licenses, and for the debts due said municipal corporation not however exceeding the amount of the limited apportionments by law authorized to be made by said board as hereinbefore set forth; but not the illegal and excessive apportionments actually made as hereinbefore set forth; this defendant further answering admits that said Metropolitan police board appointed and employed the officers and members of the police force in said district under contracts for such services, but the said Metropolitan police board made contracts to a large amount far in excess of the power of said board, and to the extent of said excess said contracts were void, and this defendant denies that the contracts of said board save to the extent permitted by law, were made upon the faith of its revenues applicable to their payment being unimpaired, but said contracts were greatly in excess of the revenues applicable to pay the expenses of

the Metropolitan police board and to the extent of said excess were void.

25 Further answering defendant admits that by the act of the legislature of Louisiana No. 35 of 1877, the various acts organizing the Metropolitan police board, were repealed; but all the provisions for the payment of said Metropolitan police was the levy of the Metropolitan police taxes authorized by law, and said taxes had already been levied far in excess of taxes that should have been imposed, and the repealing legislation did not interfere in any manner with the levy and application of said taxes to the extent that they could be collected to the payment of the legal obligations of said Metropolitan police board, and with this statement and a reference to said repealing act, this defendant denies the allegation in the bill that by such repealing legislation, no provision was made for the liquidation of the affairs of said board or payment of its debts.

This defendant again affirms that said repealing act did not interfere in any manner with the means of payment of all lawful obligations of said board, nor with the right of those who had made lawful contracts that is to the extent authorized by law with said board, and this defendant again refers to the illegal and void apportionments of said board, and to the alleged contracts made by it, far in excess of the means applicable to the support of the Metropolitan police, and far in excess of their power, and denies to be true that said repealing act was in violation of the Constitution of the United States or "impaired the obligation of the contracts of said board with its officers and employees who had contracted with and rendered services to said board upon the faith of said provisions of law for the enforced payment and collection of the sums due to it from the several cities and parishes within said district," and denies that said act was void and null in any respect or to any extent.

This defendant further answering admits that from and after said repealing legislation, this defendant continued to collect the Metropolitan police taxes levied as set forth herein, but this defendant has paid over all it has ever collected to those authorized to receive it as set forth herein, and in said exhibit, and said collections have all been paid over for the purposes of providing the means to pay the legal apportionments which said board was authorized to make, but not the grossly illegal aforesaid apportionments actually made by the board, and defendant with this statement denies "that this defendant is now making such collections and enforcing the payment of taxes levied for that purpose, and now has a large sum of money thus realized, applicable to the payment of the city's pretended indebtedness to said board of Metropolitan police, and ought to be distributed among the creditors of said board;" and this defendant shows that all said Metropolitan police taxes to the extent susceptible of collection, have as this defendant believes already been collected, and all have been accounted for prior to the filing of this bill, and this defendant shows that all said Metropolitan police taxes it has or can collect is shown by said exhibit and the fact is

that this defendant has no money whatever derived from said taxes in its hands, and this defendant denies "that this defend-
26 ant now has a large or any sum of money thus realized, applicable to the payment of the city's pretended indebtedness to said board of police, and ought to be distributed among the creditors of said board."

This defendant refers to the acts organizing the Metropolitan police board, to show the character of said board, and also to the repeal of said acts, and submits whether the matters alleged in the bill entitle the complainant to aid in this court or any court; this defendant admits that it had collected a large amount of Metropolitan police taxes for 1874, 1875 and 1876, applicable to the payment of the legal apportionments of said board, but denies that the said fund was applicable to payments of the aforesaid illegal apportionments made by the board, that in that condition a receiver for said taxes was applied for and appointed by the civil district court of the city of New Orleans, to wit: R. B. Harrison; that said receiver brought suit against the city for said Metropolitan police taxes of 1874, 1875, 1876, and recovered thirty thousand nine hundred and forty-four dollars and forty cents for said taxes, and the said amount was long since paid by the city to said receiver, and the same has been distributed by him to the creditors, entitled thereto, and further answering defendant avers that the city after said judgment and payment thereunder, paid over other amounts derived from said taxes, and all that the city ever collected has been paid over as already shown, and defendant denies that said amount paid over since said judgment, does not exceed one thousand dollars, but all of said taxes collected by defendant before or since said judgment and payment thereunder, are shown by the exhibits herewith filed, to which reference is again made for fuller explanation and greater certainty; defendant further admits the death of said Harrison, the subsequent appointment of Joseph P. Hornor as receiver; but avers said appointment of said Horner was illegal and has since been rescinded by the civil district court; defendant further answering admits the institution of the suit in this court by L. Goldstein claiming to hold Metropolitan police warrant-, and to be the assignee of such warrants, and that the suit was brought in the 26th judicial district court for the parish of Jefferson against the complainant and the other defendants herein claiming the appointment of a receiver, and the enforcement of the pretended liability of said Metropolitan police board, and said suit was removed into this court; whether citations were or not issued as stated in the bill, defendant refers to the record, but defendant avers that this court had no jurisdiction whatever of said suit, and it was so adjudged; defendant admits that the asserted pretended creditors of said board appeared before the master and offered proof of their demands, but whether the same were or were not true, this defendant submits is a question for this court, but this defendant avers that all said demands were and are in excess of the limitation on said board, and beyond the power of said board to create.

Defendant further answering says that whether or not the com-

plainant is the holder and owner of Metropolitan police warrants and certificates to the amount stated in the bill for alleged debts or alleged supplies furnished, or whether said warrants and certificates the complainant claims to hold were or not included in those claimed to be held and sued upon by said Goldstein, and whether or not complainant has acquired them or any part of them, this defendant has no knowledge, information or belief, save as stated in the bill, but this defendant again avers that said board issued a large amount of illegal warrants and certificates far in excess of their power, and of the limitation upon them as already
27 stated, and if the complainant holds such *the* warrants and certificates, defendant denies their validity and charges they are illegal and void.

And further answering this defendant says whether or not there are outstanding warrants and certificates of said Metropolitan police board to the amount of two hundred thousand dollars, this defendant has no knowledge, information or belief, save as charged in the bill, but defendant again affirms that if there are such warrants and certificates extant, they are illegal because issued in excess of the aforesaid limitation and power of the board, and have no obligatory force, and subject to those allegations defendant denies to be true, the allegation in the bill "that said several cities and parishes within the police district being required by law to receive in payment of all taxes, licenses and debts due to them, the warrants issued by said board and by the act of the legislature, No. 33 of 1874, all restrictions upon the amount to be so received were removed," as to the requirements of the acts organizing the Metropolitan police board in reference to the receipt by the defendant of Metropolitan police warrants, and as to the pretended removal of all restrictions in that regard defendant refers to said acts for answer to that part of the bill, but denies to be true that all restrictions on the amount of said warrants received by the city was removed, but on the contrary, the amount to be received was at all times restricted and limited as in this bill has been set forth; defendant refers to the exhibit accompanying this answer to show the amount of warrants received by the city, and avers that the amount so received was in excess of the amount which said board was entitled to issue and in this sense, admits the city did receive more than she should have received and more than her just proportion; defendant believes and charges that when said board was abolished, there was left uncollected the Metropolitan police taxes levied by the city of New Orleans and yet uncollected, and it may be by other political corporations composing the districts, and defendant believes to be true that said uncollected taxes were the only assets of said board, but no amount whatever ever became due by said city to said board in respect to said taxes until the same were actually collected, and no such amounts are now due as defendant has accounted and more than accounted for all said taxes ever collected; and with this statement denies to be true the charge in the bill "that the aggregate amount of said indebtedness to said board largely exceeds the total amount of its debts and liabilities," the fact being that there is no

indebtedness whatever of defendant to said board; defendant further answering shows that the pretended liabilities of said board are wholly illegal and void as has been heretofore set forth, and denies to be true "that law and equity require that the amount of said assets should be ascertained, and the just proportion due by each of the defendants be adjusted and that the liability to said board of police be fixed and determined and paid out of said assets, or if the same exceed the alleged liability of the board that said defendant be required to pay over the *pro rata* share thereof" the fact being that there are no debts and liabilities of said board entitled in law or equity to be recognized, or any debts and liabilities of said board of any nature, or any basis to require this defendant to pay any alleged *pro rata* share of apportionments to said board, or any amount whatever."

And this defendant denies all unlawful combination and confederacy in the bill charged without this that there is any matter or thing material or necessary for this defendant to make answer
28 unto, and not herein or hereby well and sufficiently answered unto, confessed or avoided, traversed or denied, is true to the knowledge or belief of this defendant, all of which matters and things this defendant is ready to aver, maintain and prove as this honorable court shall direct, and prays to be hence dismissed, for costs and for a decree in its favor.

(Signed) JOS. A. SHAKSPEARE, *Mayor.*
HENRY C. MILLER,
Solicitor of Defendant.
CARLETON HUNT,
City Attorney, Solicitor for Def't.

Joseph A. Shakspeare, mayor of the city of New Orleans being duly sworn *and* says: that he has read the foregoing answer and signed the same, and knows the contents thereof to be true of his own knowledge, except as to the matters therein stated to be on his information and belief, and as to those matters he believes them to be true.

(Signed) JOS. A. SHAKSPEARE, *Mayor.*

Sworn and subscribed to before me, this 16th day of May, 1891.

[SEAL.] (Signed) W. H. PASCOE,
Notary Public.

29 United States Circuit Court of Appeals for the Fifth Circuit.

I, J. M. McKee, clerk of the United States circuit court of appeals for the fifth circuit, do hereby certify that the foregoing twenty-eight pages, numbered from 1 to 28, inclusive, contain a true copy of the statement and questions certified to the Supreme Court of the United States and of the bill of complaint and of the demurrer and the answer of the city of New Orleans thereto in the case of The City of New Orleans *vs.* H. W. Benjamin *et als.*, No. 142, November term,

1892, as the same remains upon the files and records of said United States circuit court of appeals for the fifth circuit.

Seal United States Circuit Court of Appeals, Fifth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of New Orleans, this 17th day of July, A. D. 1893.

J. M. McKEE, *Clerk.*

Endorsed on cover: Case No. 15,365. U. S. circuit court of appeals, 5th circuit. Term No., 981. The City of New Orleans, appellant, *vs.* H. W. Benjamin *et al.* Filed July 31st, 1893.

FILED
OCT 20 1893
JAMES H. McKENNE
CLE

153-411

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 981.

THE CITY OF NEW ORLEANS, APPELLANT,

vs.

H. W. BENJAMIN ET AL.

MOTION TO DISMISS AND BRIEF IN SUPPORT THEREOF.

J. D. ROUSE,
WM. GRANT,
Of Counsel.

L. GRAHAM & SON, 44-46 BARONNE ST., NEW ORLEANS.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 981.

THE CITY OF NEW ORLEANS, APPELLANT,

vs.

H. W. BENJAMIN ET AL.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

MOTION TO DISMISS.

And now comes Henry W. Benjamin, one of the appellees, by J. D. Rouse and William Grant, his solicitors, and suggesting that:

The case is one in which the jurisdiction of the Circuit Court, in which the suit was originally brought, is in issue:

The case is one involving the construction and application of the Constitution of the United States:

The case involves the construction of a statute of the State of Louisiana, which is claimed to be in contravention of the Constitution of the United States.

That therefore the United States Circuit Court of Appeals for the Fifth Circuit is and was without jurisdiction of the appeal to it, appellate jurisdiction in such cases being

vested solely in this Honorable Court. And that said Circuit Court of Appeals being without jurisdiction of the case, it was incompetent to make the certificate herein, and such certificate brings nothing before this court for decision.

Wherefore said appellee, by his said solicitors, moves this Honorable Court to dismiss this case for want of jurisdiction thereof.

Respectfully submitted,

J. D. ROUSE,
WILLIAM GRANT,
Solicitors.

Brief in behalf of Appellee, upon his motion to dismiss for want of jurisdiction.

STATEMENT.

The motion to dismiss this case is founded upon the lack of jurisdiction in the Circuit Court of Appeals to entertain the appeal to that court, it therefore being without authority under the statute to certify any question or proposition of law to this court for its instruction.

The statement of the case certified with the questions, and the questions as well (at least the first three), show that the main contest in the Court of Appeals was over the jurisdiction of the court from which the appeal came.

The statement shows that the complainant, an alien, brought his bill in the Circuit Court, alleging himself to be a creditor of the Board of Metropolitan Police, a body corporate under the laws of Louisiana, formerly invested with the police government of a district comprising three parishes, including the city of New Orleans and other municipalities; that the expenses of the Board were authorized and required to be annually estimated and apportioned to the parishes and municipal corporations within the district, which were required to pay the same, and were authorized to raise the amount by taxation; all warrants issued by the board being made receivable for all taxes, licenses and dues of said parishes and municipalities. The bill also alleged the repeal by the Louisiana Legislature of the act creating the board; the act making its warrants receivable for taxes; the act requiring the parishes and municipalities in the district to pay and provide the means for the payment of their respective apportionments of police expenses; as well as all other acts amendatory thereof; that by said repealing

act said board was abolished; that it had no representative or successor; and that no provision had been made for the liquidation of its affairs or the payment of its debts.

Complainant is holder and owner of police warrants and other claims against said Board, originating in contracts therewith; and he alleged that said repealing act impaired the obligation of such contracts in violation of the Constitution of the United States, and is therefore null and void. (R., pp. 1–3.)

The City of New Orleans demurred to the bill for want of equity, and also by its demurrer, it being a speaking one, alleged "that the only mode of payment of said alleged debts, if any, of the late Metropolitan Police Board * * * * is by taxes *to be levied* for that purpose, and if it be true, as asserted by said bill, that no provision now exists for the payment of said asserted debts, this court has no power to direct the levy of taxes for said asserted debts or any power whatever to grant any relief in respect to the matters of which the bill complains." (R., p. 5.)

The demurrer admits the averments of the bill, and such admission can not be avoided or qualified by the language employed; but the language quoted asserts the validity of the repealing act, and that it took away all power from the court to afford a remedy.

The demurrer being overruled an answer was filed, in which the city "denies to be true that said repealing act was in violation of the Constitution of the United States or impaired the obligation of the contracts of said board with its officers and employés, who had contracted with and rendered services to said board upon the faith of said provisions of law for the enforced payment and collection of the sums due to it from the several cities and parishes within said district, and denies that said act was null and void in any respect or to any extent" (R., p. 5).

Thus was issue joined upon the validity of the act.

It appearing that complainant and intervenor were assignees of the warrants and claims held by them, and that their assignors were citizens of Louisiana, the city of New Orleans moved to dismiss the suit for want of jurisdiction in the Circuit Court (R., p. 5).

Upon this state of the pleadings and proceedings in the Circuit Court, the Court of Appeals propounds the following questions to this court, viz:

First. Does the case made by the bill alleging that the Board of Police had been abolished and left without successor, or legal representative, and no provision has been made for the application of its assets to the payment of its debts, and the answer herein, constitute a suit in equity under the Constitution of the United States, and within the jurisdiction of the Circuit Court for the Eastern District of Louisiana, without regard for the diverse citizenship of the parties?

Second. The warrants and the certificates held by the complainant having been issued for services rendered and supplies furnished under contract with the Board of Metropolitan Police, when the laws required said warrants and certificates to be received by the defendants in payment of all licenses, taxes and other dues, and all such laws having been repealed by the Legislature of Louisiana without making other provision for the redemption of said warrants and certificates, was this an impairment of the obligation of the contract in relation to such warrants and certificates within the meaning of Art. 1, Sec. 10, of the Constitution of the United States?

Third. Do the pleadings show a suit to recover the contents of choses in action within the meaning of the judiciary act of 1887 and 1888, so as to preclude the complainant, as assignee, from suing in the Circuit Court to establish a fund out of which he, in common with other creditors of the late Metropolitan Police Board, may be paid pro rata upon their claims?

ARGUMENT.

The question presents itself on the face of the record whether the Circuit Court of Appeals has jurisdiction of the appeal under the act of March 3, 1891; and if it has not, whether that court is authorized to certify any question of law upon which the Supreme Court is required to give instructions.

It may be conceded that when the jurisdiction of the Circuit Court depends entirely upon the diverse citizenship of the parties, the right of review vests in the Court of Appeals, under the sixth section. This was so decided in *Wauton vs. DeWolf*, 142 U. S. 138. In such case its decision would be final and the *case* would be subject to review here by certificate or writ of *certiorari* in the manner pointed out in the act.

But if there be a jurisdictional *issue* even in such a case, the question thus raised, but not the whole case, would go directly to the Supreme Court under the first clause of the fifth section.

Here, however, there is no issue as to the diverse citizenship of the parties—it is not disputed that the complainant is an alien and the defendant a citizen of the State of Louisiana.

The case, for the purposes of appellate jurisdiction, involves (1) a jurisdictional issue growing out of the construction and application of the Constitution of the United States; (2) the construction and application of that Constitution, and (3) a claim that a law of the State of Louisiana is in contravention thereof. It, therefore, falls directly within the class of cases in which the appellate jurisdiction is exclusively vested in the Supreme Court under Sec. 5.

The cases in which the Court of Appeals is authorized to certify questions are those "within its appellate jurisdiction" under Sec. 6. This is the statutory condition

upon which the supervisory jurisdiction of this court is to be exercised, whether for the purpose of giving instructions, or ordering the whole case certified for decision by *certiorari* or otherwise.

Although this court has not expressly decided this question, the writ of *certiorari* in *Lau Ow Bew Petitioner*, 141 U. S. 583, was allowed on the assumption that the Court of Appeals had jurisdiction of the case, and the principle here contended for was clearly recognized.

This case was no doubt taken to the Circuit Court of Appeals, on the supposed authority of *McLish vs. Roff*, 141 U. S. 661; it being assumed that in all cases involving the jurisdiction of the Circuit Court the party cast may elect to take his appeal directly to the Supreme Court on the jurisdictional question, in the first instance, or go to the Court of Appeals with the whole case, and that the latter court might, if it deemed proper, certify the jurisdictional question for instruction. But it is to be noted that the jurisdiction of the territorial court in that case depended entirely on the diverse citizenship of the parties; and whatever the court said must be held to relate solely to the question then at issue. Certainly the court did not intend to say that a case involving the construction of the Constitution of the United States and the validity of a State law might take the same course, simply because in a certain aspect, the case might also contain a jurisdictional issue arising out of the Constitution.

If a party may elect to go to the Circuit Court of Appeals in any case in which the subject matter of the decree is within the jurisdiction of this court under Section 5 of the act, it must be because he has the right to waive the jurisdictional questions and take the case to the former on the other issues. If this can be done the principal questions certified in this case can not be considered as pending in the Court of Appeals, and this court is not required to answer them.

But we submit that neither one nor both of the parties can by consent confer jurisdiction on the Court of Appeals, contrary to the statute. Certainly one of them can not deprive the other of the right to have the case reviewed in the tribunal to which it properly belongs by any mere election.

Want of jurisdiction in the Circuit Court of Appeals being apparent on the face of the record, although the question was not raised in the court below, will be noticed here. This is a rule well established in cases appealed from a circuit court before the Act of 1891. See *Metcalf vs. Watertown*, 128 U. S. 586, and *Parker vs. Ormsby*, 141 U. S. 81. And in sound principle it applies to cases coming from the Court of Appeals.

It applies also to cases certified from the Circuit and District Courts on division of opinion, and it was so held in *United States vs. Pile*, 130 U. S. 280, in which the court said: "We do not understand that the court at that time had any further jurisdiction of the case * * * the certificate of division related to a matter in which they had no right to make such a certificate. It therefore brings nothing before this court for review," and the case was dismissed.

The motion to dismiss should be granted.

Respectfully submitted,

J. D. ROUSE,

WM. GRANT,

Of Counsel.

OCT 17 1893
JAMES H. McKENNEY,
CLERK

15-3-411

UNITED STATES SUPREME COURT

No. 281.

THE CITY OF NEW ORLEANS, APPELLANT,

versus

HENRY W. DEGRAY, ET AL.

Brief for the City of New Orleans on the Motion to Dismiss.

[illegible]

HENRY C. MILLER,

Solicitors for the City of New Orleans.

[illegible]

UNITEDSTATES SUPREME COURT

No. 981.

THE CITY OF NEW ORLEANS, APPELLANT,

versus

HENRY W. BENJAMIN, ET ALS.

Brief for the City of New Orleans, on the Motion to Dismiss.

The Circuit Court of Appeals for the Fifth Circuit has certified to this Court four questions arising in this suit, and the defendant in the appeal, the Complainant in the Circuit Court now moves that this Court dismiss, on the ground the Circuit Court of Appeals had no jurisdiction of the suit, or to certify, and this Court has no power to answer the questions. Whether the answer to these questions is at all speeded, or any precedent exists for the motion to dismiss, is for this Court to determine. On the questions certified, there is a brief already filed by the City of New Orleans, the appellant in the Circuit Court of Appeals, and the defendant in the Circuit Court. To that brief this Court is respectfully referred. In the development

of the basis for the motion to dismiss, it is alleged that the suit in the Circuit Court involved the application of the Constitution of the United States, and the validity of a statute of the State of Louisiana charged to conflict with the Constitution. It is claimed in the motion that the suit involving this question, should have gone by appeal from the Circuit Court to this Court, under the fifth section of the act of 3d March, 1891, and hence, the Circuit Court of Appeals had no jurisdiction of the suit or to certify the questions. See motion to dismiss It is believed that this Court on examination will not ascribe to the supposed constitutional question the importance attributed to it by the motion, and besides, that asserted question, it will be found, the suit involved issues, of which the Circuit Court of Appeals only could take cognizance on appeal, with the right to certify to this Court any question on which instruction was desired. Act of Congress, 3d March, 1891, 26th Statutes, page 661. McLish vs. Roff, 141 U. S., page 661.

The bill is filed to obtain the payment of warrants and certificates amounting to $5,032.00 issued mainly for the pay of policemen, by the Metropolitan Police Board, a municipal corporation created in 1868, charged with the maintenance of the police of the city. The bill asserts the contract of the creditors, the hol-

ders of these warrants and certificates was impaired by an Act of the Legislature of 1877. Bill, Paragraphs 8th, 15th, 16th, 10th and 11th, and prayer of the bill. Record, pages 10, et. seq. This Act of 1877 was to change the police system of New Orleans. There were extant warrants and certificates of the Police Board, when the Act of 1877 was passed. The act done away with the Metropolitan Police created by the Legislature of 1868, and transferred the police functions to the City of New Orleans to be exerted under its charter. The act is printed at page 24 of the appendix, to the brief of the City on the questions, if the court has any desire to read it. The act repealed the laws establishing or relating to the Metropolitan Police. It is charged in the bill, there was no successor or representative appointed for the abolished Board, and no provision made for the liquidation of its affairs or payment of its debts. The conclusion the bill deduces, is that the Act of 1877 violated Article 1, Section 10, of the Constitution of the United States. Bill, Paragraph 10 and 11, Record, page 11. The court from an inspection of the Act of 1877 will not readily appreciate how it could be deemed to impair any right, still less how it could produce any kind of contention under the Constitution of the United States. The Metropolitan Police established by the Act of 1868, proved very

burdensome. For the eight years of the existence of the Board, i. e. from 1868 to 1876, when the Board was abolished, the demands for its support ranged from $500,000 to over $900.000 per annum. See Statement in paragraph 3d and 4th, of the bill, Record, page 9. The Act of 1877 was to get rid of an expensive police, and doubtless, there were other considerations of public policy for the change. The charge was made, and to mark the economic motive of the legislature, the restrictions is expressed in the act, that the cost of the new police shall never exceed $325,000 per annum, in marked contrast, with the huge estimates and apportionments of this Police Board. The Act of 1877 certainly did abolish the Metropolitan Police Board. That was inevitable to the police change. It goes without saying that no successor was appointed for an abolished Board, except the City of New Orleans, restored by the Act of 1877, to the charge of its police. It is equally true, the Act of 1877, did not provide for the application of the assets of Board, or payment of its debts. The framers of the act doubtless, thought it entirely sufficient, to leave the liquidation of the affairs of the Board, and payment of its debts to the City of New Orleans. The assets of this Board, if the term can be used, consisted entirely of the Metropolitan Police taxes imposed by the City, for payment

of the warrants and certificates, and the City was charged with the obligation of collecting and accounting for the Police taxes. The taxes were levied in full force when the Act of 1877 was enacted, and left untouched, and enforced, as the bill itself admits, after as before the act of 1877 [illegible] for the benefit of these creditors, who now assert an impairment of their contract right. Admissions in the bill, as to levy and enforcement of the Police taxes, Paragraph 7th, 12th, 14th, Record, page 10, et seq. It is this police legislation for the City of New Orleans manifesting no purpose to disturb any right, but simply abolishing one police system and substituting another, to save expense as avowed in the act, and from other public motives, that it is now claimed was forbidden by the Federal Constitution. The mission of the act was to repeal previous laws in order to establish the new police. With the performanee of that mission, the act stopped. The police power is always reserved, and even contract rights yield to its exercise. The Beer case, 97th U. S, 25th U. S, 750. If this Act of 1877 could be deemed to cause any injury or inconvenience to holders of the warrants and certificates issued by this Board, extant when the act was passed, still that injury or inconvenience would be only the inevitable result of the exercise of this reserved

power of legislation, to which all must submit, and none can complain, least of all of an invasion of contract right. This then, is one phase of that constitution question which the holders of these warrants claim to evolve out of this Police legislation, and which in their view makes a case for the attention of this Court under the fifth section of the Act of 1891.

The provision for the payment of these warrants and certificates by the act of 1868, was the Police taxes based on the estimates and apportionments of the Board, The important function of the Board was to make the estimates and apportionments. The levy of the Police taxes was to follow, imposed and to be collected and paid over to the Board by the City. Act of 1868, sections 27, 29, 30. When the Act of 1877 was enacted these apportionments had all been made and the taxes imposed. The bill admits it. Bill, paragraphs 4th, 5th, 6th and 7th; Record, page 10. Now, while the act of 1877 operating for the future repealed the acts on the subject of the Metropolitan Police, it did not disturb apportionments made in the past nor the Police taxes levied to pay the creditors of the Board. The act of 1877 suggests no such purpose. It had no such effect. Nor does the bill undertake to deny this substantial provision for payment of

the creditors. On the contrary the enforcement and application of the police taxes by the City of New Orleans ever since the Act of 1877, to the payment of the warrants and certificates is admitted. Bill, paragraphs 12, 14, 17; Record, page 11, et seq. The bill also undertakes to assert the City was a debtor for the amount of the apportionments. If so, the act of 1877 did not undertake to discharge the liability. The usual remedies to enforce, if at all necessary, the application of the police taxes to pay the warrants and certificates were left untouched by the act, and, as the bill shows, freely availed of by the creditors as occasion required, with no whisper of any impediment created by the act of 1877. Bill, paragraphs 14th, 15th. High on Remedies, S. 374, et seq. 2d Dillon on Municipal Corporations, Sec. 729. 2 Woods, page 113. With this provision for payment and the usual remedies left in full force, what weight is due to the allegation that this act of 1877 impaired contract rights? The import of the allegation comes to this: that the Legislature changed the police and abolished the Police Board. This necessary and wholesome legislation is in effect presented in the motion, as of the dignity and importance of stripping the Court of Appeals of any cognizance and clothing this tribunal with jurisdiction of this suit for policemen's pay.

There was another provision for the redemption of these warrants and certificates. They were to be received up to the amount of the apportionments against the cities and parishes of the police district, in payment of municipal taxes. licenses and dues. Acts 1869, No. 44; Act 41 of 1870, appendix to main brief, pages 9 and 10. This right of tender had been restricted by the act No. 33 of 1874, three years before the act of 1877. Of the act of 1874, the bill makes no complaint. It put a stop to the tender of warrants for the police taxes, with the proviso that warrants isssued prior to January 1st, 1874, might still be tendered in payment of of taxes for years prior to 1874. Act No. 33 of 1874, 4th appendix to brief in question, pages 16 and 17. The right to use warrants to pay current taxes, is of course of greater value than warrants receivable only for past taxes. The right of tender became of less importance as years rolled by, and the chances became less of paying old taxes with old warrants. The Constitution of the State adopted in 1880, in full force when this bill was filed in 1891, and for eleven years before this complaint of impaired right, entitled every holder of every warrant or other form of municipal scrip to pay in such scrip, all taxes and licenses due any municipal corporation, a greater right of tender for taxes than accorded in this respect originally. Con-

stitution of 1880, Miscellaneous Ordinances; Act 49 of 1880, appendix, pages 28, 31. What sort of complaint of wrong and of violation of right is that urged in full view of the organic law of State, which redressed the wrong if any had been done by the act of 1877. The answer comes from 129th U. S. pages 36, 41, 44, and similar cases in which this Court has been called on to protect its jurisdiction, and exclude controversies having no foundation. But the prayer of this bill is enough on this branch of the case. It makes no demand to enforce the receivability of the warrants and certificates It is just the relief the complainant did not seek or desire. It asks that the City pay in cash the amount of the alleged debts, i. e. the apportionments. In the Virginia cases the wrong complained of, was the refusal of the state authorities to receive its coupons tendered for taxes. The relief asked was a mandamus to compel the receiving of the warrants. 102 U. S. 672; 114 U. S. 269, 325. Here, there is not even the averment of the refusal of any tender of any warrants or certificates, and no claim that they be decreed to be received. No such averment could have been made. Nor there was the least desire, and still less room for such redress. How then can it be said that this suit involves the impairment of this right of tender, and therefore the

violation of the contract right or any right? The supposed right was guaranteed by the organic law of the State, and is actually discarded by the bill. The right of tender is thus not an element in the controversy.

It is stated in the motion of Complainant, the City joined issue on this asserted constitutional questions affirmed the validity of the act and that it took away all power of the court to afford a remedy. A demurrer to test the sufficiency of the allegations of the bill, could not give to the allegations in the bill any strength, least of all, create a constitutional issue, dependent altogether upon the interpretation of legislative acts. But the demurrer in this case had no purpose to deal with the constitutional issue. Nor did it. The bill sought the payment by the cities and parishes of the warrants and certificates. As the only provision by law for their payment were the Police taxes, the demurrer referred to that provision. It in effect suggested the Complainant had mistaken his remedy. The demurrer proceeded, "if it be true," as asserted by the bill, that no provision exists for the payment of the debts, the Court had no power to grant relief. Record, page 15. The demurrer was not a speaking demurrer, nor did it admit anything, except that the legal provision for payment of the warrants, were the taxes. Prefaced by the usual

formula in all demurrers, it did not admit that no provision existed for payment. But the demurrer announced the legal conclusion, i. e. if it were true there was no provision as asserted in the bill, then there was no remedy in the courts. This is precisely the decision in Heine vs. Levee Commissioners; 19th Wallace; page 655.

It is shown by the third question that the suit involved another question. The suit is by an assignee of choses in action, i. e. the warrants and certificates issued by a municipal corporation, the Board of Metropolitan Police, not payable to bearer, and the bill contains no averment, the original holders could have sued in the Circuit Court if no assignment had been made. Moreover, as the policemen to whom the mass of the warrants and certificates issued were required by law to be the citizens of the State of Louisiana, this jurisdictional averment could not have been made. Act 1868, Section 8th, appendix to brief on questions, page 1. This suit is the second experiment in the Circuit Court on these warrants and certificates. The first was in the name of Goldstein, an assignee. That suit failed on the point of jurisdiction. Goldstein vs. New Orleans, 38th Federal Reporter, page 626. This suit is on the same obligations, this time in the name of Benjamin, another alien. It is proper to state that under

cover of Benjamins suit, there were intervention of numerous parties holding the bulk of the obligations, Benjamin, the leader of the array being alleged to hold only $5000 of the $130,000. In this aspect alone, the suit should have been dismissed. Act of Congress, 13th August, 1888, 25th Statutes at large, page 434, of 3d March, 1875; 18th Statutes, page 472; 109th United States reports, page 354. But irrespective of this phase of the controversy not certified, it is manifest that the suit involved the issue, whether an assignee can sue in the Circuit Court on choses in action, issued by a municipal corporation, not payable to bearer, with neither averment or proof capable of being administered, that his assignor could have sued if no assignment had been made. That question is patent, and is the third certified to this Court. The difficulty of maintaining the suit in view of the restriction in the judicary act, is sought to be overcome by the form of relief prayed by the bill, and by the insistence that the suit presents the question of a violation of the contract already discussed. It was doubtless, in view of the very serious trouble of maintaining this suit by an assignee, brought in the teeth of the prohibition of the judiciary act, that prompted the allegation introduced in the bill of the imparement of the contract. This exigency of case, will aid the Court in estimating the weight due

to that supposed question, i. e. this alleged impairement, which it is claimed should have brought this case by appeal to this Court. It is too clear for discussion, that whether the relief claimed is legal or equitable, and wholly irrespective of any allegations, whether of an impaired contract of of any nature, and whether real or pretended; that the restriction of the judiciary act remains the same, i e. the assignee of the chose in action must aver and prove if required, the requisite citizenship of the assignor, the chose in action not being within any of the exceptions of the Acts of Congress cited. 4th Dallas, page 8; 19th Wallace, page 81; 105th U. S., page 667; 109th U. S., page 354; 8th Howard, page 440; 33d Fed. Reports, p. 197; 52d Fed. Reports, p. 177. The suit on this ground alone, it would certainly seem should have perished in the Circuit Court.

Besides, these questions, the suit involved another, the real issue requiring determination, if the suit could possibly, the difficulty last discussed. The bill to compel the City of New Orleans, and the other defendants to pay these warrants and certificates issued by this Metropolitan Police Board, involves neccessarily the question of the liability of the City, and of the other defendants, under the legislative acts creating this Metropolitan Police and Board. It is the issue made by the bill

and the defence on this branch of the case, is prominent in the answer. As already stated at the outset of this brief, the Police expenses under the Metropolitan Police system, were to be supported by taxation based on the estimates or apportionments. The bill undertakes to assert that the cities and parishes of the Police District, were required to pay these estimates as debts. It may be stated by way of illustrating this pretension of the bill, that the total amount of all these warrants and certificates unpaid is $129,000, as shown by the Masters report to be found at page 111 of the original record of the Court feels disposed to look at it. But the balance of these apportionments or estimates which this bill undertakes to treat as debts after crediting all payments by the City, is nine hundred and forty thousand dollars, for which enormous amount the bill alleges "the City is liable," qualified by the prayer for a decree, for so much of the amount as is neccessary to pay the creditors. See Bill, paragraph 7th, Record, pp. 10, 14. On the theory that the City was required by these acts, to pay the amount of these apportionments to this Police Board, which the bill undertakes to maintain to be the law, the City would have been compelled to pay Eight hundred thousand dollars more than the entire police expenses, huge as they were under the administration of this Board. The answer contends no such

interpretation of the acts can be admitted, that transforms into debts, mere estimated police expenses, and estimates grossly inflated, as the bill itself shows. The answer maintains that the apportionments were simply to furnish the measure of the Police taxes, required by the acts to be levied up to the amount of the apportionments; that the only obligation imposed on the City and the parishes in relation to this Police Board, and its debts was to levy the Police taxes, and collect and pay over to the Board the taxes collected, and that this obligation has been fully discharged, and the answer further maintains that this liability only, is that recognized by the Supreme Court of the State. See answer, Record, pages 16, 19, 20; Harrisson vs. City, 40th Louisiana Annual Reports, page 509. This issue, the liability of the City under the legislative acts, whether according to the theory of the bill or liable only for the Police taxes collected, was of course the leading issue aside from those raised by the motions of the City to dismiss the suit. It is of course, plain that this issue of the liability of the City could go by appeal only to the Circuit Court of Appeals. Act of Congress, 3d March, 1891, Sections 5th and 6th; 26th Statutes at large, page 826. This Court will appreciate as it deserves, the supposed constitutional question made the basis of the motion in this Court to

dismiss. If that question is deemed in any sense, to be a factor in this controversy, it is still plain that the suit involved other issues. It will hardly be attempted to be maintained, that these other issues were of a character to carry this case on appeal to this Court. This Court surely, could not be be asked to determine the question of the liability of the City for these warrants and certificates dependent entirely, on the Louisiana Statutes, with the light afforded by the decision of the Supreme Court of the State,

It was, of course in the contemplation of the Act of Congress of the 3d March, 1891, in distributing the appellate jurisdiction of the Supreme Court and of the Circuit Court of Appeals, that cases might arise exhibiting only issues proper for the cognizance of the Supreme Court. Hence, the fifth section of the act. It was equally plain to those that framed the act, that there were cases to arise involving issues not within the scope of the fifth section, but in which constitutional or jurisdictional issues might arise. In such cases, i. e. of mixed issues to use the words as a convenient expression, the act certainly did not intend the suit should be divided into parts, one part to go to the Supreme Court, on the questions specified in the

fifth section, and the other to the Circuit Court of Appeals, on the other issues involved. At the same time it was the purpose to secure to the litigant in these mixed cases the benefit of the review by this Court, of any questions within the jurisdiction of this Court. Hence, the sixth section which gives to the Circuit Court of Appeals jurisdiction of all suits involving issues not embraced in the fifth section, with the right to certify to this Court any and all questions, that may arise in the case, and the party relying on any ground of action or defence of a constitutional or jurisdictional nature mentioned in the fifth section, has the right to compel such questions to be certified. Rule 3, Supreme Court, paragraph 3; 141 U. S., page 583. It follows, that this suit involving issues raised by the bill, and answer not cognizable by appeal in the Supreme Court of the United States, was properly carried by appeal to the Circuit Court of Appeals, under the 6th section of act. If taken to the Supreme Court of the United States, it would have been to waive the defences of the City. The case would have stood here, on no ground whatever, save the attenuated basis of the supposed constitutional question, and on that alone. The Act of 1891 is not to be construed to sacrifice the defences or grounds of action of the litigant. In cases involving mixed issues part cognizable in the Supreme Court, and part in

the Circuit Court of Appeals, the appellant is not required or permitted to take two appeals. He is not required to go to the Supreme Court on the questions cognizable in that Court, and thereby waive other defences. He can assert all his rights by one appeal of the whole case to the Circuit Court of Appeals, and from that Court the questions pertaining to the jurisdiction of the Supreme Court can be certified. In this view, this appeal was to the Circuit Court of Appeals, and that Court had the jurisdiction to certify to this Court the questions on which instructions are desired. Nor does this in the slightest degree injure the appellee. He is not in any manner deprived in the smallest degree of any and all advantage, he can possibly derive from the supposed constitutional issue of claims dominates this case. This Court is called on to answer as to that issue, and will, it is believed, have no great trouble on the subject. See 1st and 2d questions, Record, page 6. The decision already pronounced of this Court on this question of appellate jurisdiction has been generally accepted. The case decided involved two questions, one of a nature to cary it to this Court, the other of a character to fall within the jurisdiction of the Circuit Court of Appeals. It was held, the Circuit Court of Appeals had the jurisdiction of the appeal.

The decision controls this case, and sustains the appeal to the Circuit Court of Appeals. McLish vs. Robb, 141 United States, page 562, et seq.

The review of this suit, has been perhaps, more extended, than the motion to dismiss in this Court strictly required. It is hoped that the Court in disposing of the motion, will also dispose of the questions certified, and thus bring this litigation to a close here, as well as put in course to obtain a decision in the Circuit Court of Appeals. It is believed that the Court will find no difficulty in sustaining the jurisdiction of the Circuit Court of Appeals to take cognizance of the appeal, and to certify the questions. There is also, is it issubmitted, the firm basis to answer the questions, so as to secure a decree from the Circuit Court of Appeals in favor of the City of New Orleans and the other defendants in the bill. To the brief for the City already filed on the questions certified, the Court is respectfully referred for a fuller discussion of the issues involved.

It is respectfully submitted, the motion to dismiss in this Court should be denied, and the appellant, the City of New Orleans respectfully suggests, whether the case is not of that character to render it proper, the Court should at the same time dispose of the questions with reasonable notice to

the other side to file a brief. The motion to dismiss calls on this Court to take the case in parts. The appellant submits the disposition now, of the questions, as well as the motion.

Respectfully submitted,

E. A. O'SULLIVAN,
HENRY C. MILLER,
Solicitors for the City of New Orleans.

FILED
JAMES H. McKENNEY
Clerk

No. 211

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 211

THE CITY OF NEW ORLEANS, APPELLANT,

vs.

H. W. BENJAMIN *et al.*

ON APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE CITY OF NEW ORLEANS

Supreme Court of the United States.

OCTOBER TERM, 1893.

No. 981.

THE CITY OF NEW ORLEANS, APPELLANT,

vs.

H. W. BENJAMIN ET AL.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF OF WM. A. MAURY, FOR APPELLANT.

STATEMENT.

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Supreme Court of the United States.

OCTOBER TERM, 1893.

No. 981.

THE CITY OF NEW ORLEANS, APPELLANT,

vs.

H. W. BENJAMIN ET AL.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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As the city of New Orleans is the only defendant that appealed from the decree of the circuit court, and was virtually the only defendant in that court, the case may be discussed without regard to the other defendants.

The state of facts upon which the complainant asks relief is substantially this: The legislature of Louisiana by an act (No. 74) approved September 14, 1868, constituted a police district out of the parishes of New Orleans, Jefferson, and St. Bernard, and designated it the "Metropolitan police district of New Orleans, State of Louisiana," and for police purposes placed it under the control of a board of commissioners styled "the board of Metropolitan police."

One of the functions of this board was to meet annually and "make up a financial estimate" of the amount of money necessary to defray the expenses of the police for the coming year, and then apportion the same among the cities and parishes within the district, according to a prescribed ratio, such apportionment, when finally made, to be binding on said cities and parishes.

The bill states the sums annually apportioned to the city of New Orleans for the seven years the board existed, and they aggregate the almost incredible sum of $6,155,697.74, and it is a fundamental contention in the suit that upon each apportionment the city, without more, became a debtor therefor to the board, out of its general treasury, for the sum named, irrespective of whether the taxes laid and collected by the city for that purpose were sufficient or not. As a result of this theory, the city, it is alleged, still owes $940,379.60 on these apportionments, and, as if at once to put an absurd face on the case, and to call to mind the wanton abuses of this police board, now, happily, abolished, the bill admits that this pretended indebtedness of the city to the board "*largely exceeds the total amount of its debts and liabilities*," which are stated in the bill to exceed $200,000, with interest. (Par. 17, p. 13.)

These warrants of the police board here in suit were after-

wards, by an act (No. 44) approved February 27, 1869, (Miller's bf., App., p. 9), made receivable, within the police district, for parish and municipal taxes not exceeding in any one year the apportionment for such year to the parish or municipality to which such warrants might be tendered, yet as no specific execution of the duty to receive these warrants such as is had at law by mandamus, but a decree for money only is asked for, it is not perceived that this act has any special significance in the case unless it be to give color to a pretended constitutional grievance, it being the great point in the bill that as the employés and others who made contracts with the police board did so "upon the faith of its revenues applicable to their payment being unimpaired" (par. 9, p. 11), so the act (No. 74) of March 31, 1877, repealing the act of 1868 establishing the police board, and several other specified acts, subsidiary thereto, invaded and impaired, it is pretended, the obligation of such contracts in the particular mentioned. (Par. 11, p. 11.)

But, with a strange inconsistency and repugnancy, the bill avers, in the very next paragraph, that the city of New Orleans has "from day to day and from year to year ever since the passage of the repealing act of March 31, 1877, aforesaid, continued to collect the taxes levied as aforesaid for the purpose of paying the apportionments of said city for police expenses, as aforesaid made and notified thereto, and is now making such collections and enforcing the payment of taxes levied for that purpose, and now has a large sum of money thus realized which is applicable to the payment of said city's indebtedness to said board of police and ought to be distributed among the creditors of said board, in reduction of their claims, including those of your orator." (Par. 12, p. 11.)

It remains to be seen how this statement in the bill can be made to stand with the claim that the repealing act of 1877 abolished the board of Metropolitan police without

making any provision "for the liquidation of its affairs or the payment of its debts." (Par. 10, p. 11.)

The bill avers that the only assets of the police board at the time of its abolition were the alleged debts of the defendants on the police board's apportionments, and seeks by means of an accounting and a receiver to have these pretended liabilities ascertained, collected, and applied to the claims of complainant and such others as may become parties to the suit. (Pp. 13, 14.)

The defendant, on the other hand, sets up in its answer that the complainant's claim is barred by the judgment of the civil district court of New Orleans in the case of R. F. Harrison *vs.* The City of New Orleans (pp. 16, 17), which is relied on to the same extent as though it had been made the subject of a plea of *res judicata*. This part of the defense, however, not being embraced by the questions certified, needs not to be more specially stated.

The city takes the further ground that the police board's apportionments were, to some extent, illegal and excessive and could not have been fully carried out by the city without exceeding the taxing limit imposed on it by law, and that it levied such taxes as it lawfully might do and as were entirely sufficient for police purposes and paid over the same in money or warrants to the board and afterwards to R. F. Harrison, receiver, in so far as collected, and that in so doing the city has performed its whole duty under the police board's apportionments, and, as a consequence, that the claim set up in the bill is destitute of support in law or fact.

The city also denies that the repealing act (No. 35) of 1877 has at all impaired complainant's rights in the premises, if any he has, but, on the contrary, avers that the act neither interfered with tax levies already made to meet the expenses of the police board nor with the collection of the taxes so levied, the means for the collection of such taxes

remaining the same after the abolition of the police board as before.

The ground is also taken by the city that the police board made contracts and issued warrants beyond its legal authority, and that it is not correct, as stated in the bill, that act No. 33, 1874, removed the pre-existing restrictions imposed by law on the right to tender warrants in payment of taxes, &c., due the city.

To this succinct statement of the opposed contentions in the case it may be added as part of this introduction to the discussion of the questions certified that the cause was referred to a master, who reported as due by the city, "on account of its apportionments, a balance of $241,106.54 and an indebtedness of the board incurred on account of said city and still unpaid amounting to $123,963.06, besides interest thereon." It was also found by the master that small amounts were due by the other defendants and also by the board on their account (p. 5).

A decree was entered requiring the defendants to pay their "virile shares" of the indebtedness of the board as reported by the master (p. 5).

From this decree an appeal was taken by the city of New Orleans to the circuit court of appeals for the fifth circuit, and on the hearing thereof the court, desiring the instruction of this Court "for the proper decision of the questions arising herein touching the jurisdiction of the circuit court," ordered four questions and propositions of law to be certified to this Court (p. 6) in accordance with the provisions of section 6 of the act of March 3, 1891, establishing circuit courts of appeals, &c., which will be considered in their order.

FIRST QUESTION.

Does the case made by the bill alleging that the board of police has been abolished and left without successor or legal representative and no provision has been made for the application of its assets to the payment of its debts and the answer herein constitute a suit in equity arising under the Constitution of the United States and within the jurisdiction of the circuit court of the United States for the eastern district of Louisiana without regard to the diverse citizenship of the parties?

Is it a Case Arising under the Constitution?

It is to be kept steadily in view that the terms in which this question is couched require that it shall be resolved *within the limits of the case made in the bill and answer.* This imperative limitation the counsel for the appellee in their labored effort to construct a Federal question have found it convenient to ignore, and have sought to support their Federal pretension by having recourse to matters outside of that limit.

Unless, therefore, the bill and answer present on their face and without extraneous aid a case in equity arising under the Constitution of the United States aside from the diverse citizenship of the appellant and the appellee, the question propounded must be answered in the negative.

The only pretense of a Federal question in the bill is that the repealing act of 1877 made no provision for the "liquidation" of the "affairs" or the payment of the debts of the abolished police board, leaving it without a successor or representative, and from these unfounded premises the conclusion is deduced that because of these omissions the act of 1877 impaired the obligation of the contracts made by

the police board with its officers and employés and others to whom it was indebted and who had contracted with and rendered services to it upon the faith of the provisions of law repealed by the act of 1877.

But, as if to destroy the effect of the Federal pretension thus made, the bill (par. 12, p. 11) makes the admission, already quoted, that ever since the repealing act of 1877 the city of New Orleans has "from day to day and year to year" continued "to collect the taxes levied as aforesaid," and is "now making such collections and enforcing the payment of taxes levied for that purpose," and has from that source a large sum of money on hand applicable to debts created by the extinct police board.

This admission, together with the invocation of the coercive power of the law by the filing of this bill, constitutes a deliberate concession by the complainant that the repealing act of 1877 left the local authorities composing the police district in the unimpaired possession of their power to make effective tax levies already made for the satisfaction of existing unpaid apportionments, for it is not set up that these authorities could levy taxes outside the law or that it is competent for the courts to compel them to pay money which they have no power under the law to raise by taxation, although the complainant's argument leads to that result.

But, aside from the admission of the bill, it can be readily shown, we apprehend, that the argument of impaired constitutional right derives no support or even color from the repealing act of 1877, and is a transparent device for evading the jurisdiction of the proper State court.

By section 27 of act No. 74 of 1868, as amended and reenacted by section 25 of act No. 92 of 1869,* it is declared that the apportionments by the police board, when finally

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* These and other laws referred to may be found in the appendix to Mr. Miller's original brief.

made, "shall be *binding* upon the respective cities and parishes within the Metropolitan district interested therein."

By section 29 of the act of 1868 (App., p. 3) and section 27 of the act of 1869 (App., p. 8) the city of New Orleans and the other local authorities within the police district are "empowered and directed annually to order and cause to be raised and collected by the tax upon the estate, real and personal, subject to taxation, according to law, within the said cities and parishes, the sums of money as aforesaid annually estimated and apportioned as the share of such city or parishes of said total expenses of the Metropolitan police district."

It will be observed that the police board had nothing to do with raising the sum apportioned to each of the local authorities within the police district. That duty resided with those authorities alone, and for its performance the power of taxation was conferred on them. It was by this power only that each community of the police district could discharge the duty raised by the board's apportionments. This duty once raised continued until discharged in the way indicated.

As there were unpaid debts resulting from the action of the police board as well as unpaid apportionments and uncollected tax levies at the time the repealing act of 1877 went into effect, it would seem to require very explicit language in that act to induce this Court to attribute to the legislature of Louisiana the fraudulent purpose to extinguish the liability fixed by the unsatisfied apportionments and tax levies as part of the plan to abrogate the laws creating the police board and the legislation subsidiary thereto.

The language of the repealing act is that the laws previously named therein "*are hereby repealed*, the said repeal to take effect from and after the passage of this act" (App., p. 26), and the concluding section of the act also repeals

"all laws or parts of laws contrary to or inconsistent with the provisions of this act."

In view of the fact that the apportionments and tax levies which had gone into effect when the repealing act was passed were the only means provided by law for the payment of the debts created by the police board on the faith of these apportionments and tax levies, and of the complainant's admission that the city of New Orleans had been enforcing the apportionments and levies made before the repealing act ever since its passage, and of the well-settled principle of construction that the impairment or disturbance of rights that have already vested under a repealed law is never held to be within the purview of the repealing act unless its words *compel* such a sense (Chew Heong *vs.* United States, 112 U. S. 536, 559; Steamship Co. *vs.* Ioliffe, 2 Wall., 450; Steamship Co. *vs.* U. S., 103 U. S., 721), it is difficult to comprehend for what object this pretense of a Federal question was started, unless it was to attract the jurisdiction of a Federal court and to be thereafter dropped.

And not only does the bill show that no Federal question exists, but the answer does also, for the defense therein set up, in so far as the repealing act is concerned, is that the apportionments and tax levies made before its enactment, in so far as legal, continued in full and unimpaired force after the act went into effect, so that we have not in the bill and answer the opposing contentions necessary to the existence of a Federal question.

It is true the bill avers that the repealing act provided no successor or legal representative of the police board and made "no provision for the application of its assets to the payment of its debts;" but it is equally true, on the other hand, that the general law was ample to protect the assets of the board and apply them to the debts created by it, and such is the theory of the bill, as it was, also, of the several suits of a similar character which have been heretofore brought against the city of New

Orleans, and which are referred to in the bill. So that the most that can be said of the repealing act in this regard is that it changed the creditors' remedy somewhat, but left all substantial rights unimpaired.

The question certified, as we have pointed out, is expressly restricted to the case made in the *bill and answer*, but the effort of the complainant is to make the response to be given by this Court to the question under consideration turn upon the case made in the *bill and the overruled demurrer*. (B'f, pp. 5, 6, &c.)

But the demurrer having been overruled and the defendant having answered, instead of standing on the demurrer, the latter was supplanted by the answer, and is no longer a part of the case, and its language has no relevancy to this discussion. But if it were admissible to refer to the demurrer, there is nothing in its terms which commits the defendant to anything more than the proposition that if the complainant's view in his bill of the effect of the repealing act were correct no case for relief was presented.

It is a novel contention, indeed, that a defendant in equity who has answered is nevertheless to be hampered in his defense by anything he may have assigned as ground for a demurrer previously filed and overruled and completely displaced by the answer.

It is equally inadmissible to consider the question certified in connection with certain propositions of law presented by complainant's brief (p. 5) as having been insisted on by defendant in the circuit court, but of which there is no evidence in the record, supposing that it mattered one way or the other whether those propositions of law were urged by defendant or not, it being by the pleadings and not the arguments that the character of a case is to be determined.

Nothing shows more plainly the absence of a real Federal question in this case than the persistent attempt to construct

one out of the demurrer and the arguments alleged to have been made in the circuit court, while the *real grounds of defense*, set up in the answer, are quite ignored, because fatal to the theory of a Federal contention in the case.

Indeed, the extreme position is taken that the demurrer having raised a Federal question on the complainant's case as stated in his bill, the defendant, when ordered to answer, on the overruling of the demurrer, was estopped to make a defense which did not concede the existence of a Federal question, and for this proposition the case of Cook *vs.* Avery (147 U. S.) is cited, in which it is intimated by the court that the defendant, who made defense on a Federal question on the first trial of the case, should not be permitted to oust jurisdiction on the second trial by divesting his defense of all Federal complexion. It is needless to remark that there is a wide difference between the cases, and that to apply the doctrine invoked to the case in hand, which has no element of bad faith, like the case cited, would be to impose an unwarrantable restriction on the right of defense by answer, and make the demurrer sometimes perilous to a defendant who has a substantial reason for desiring to shelter himself by that means from the necessity of giving the discovery which the answer necessitates.

IS IT A CASE IN EQUITY?

It is a great misapprehension to suppose that the police board had the power under the law to become a debtor. It had no such power. It had a fund provided by the authorities composing the police district, *and that fund was the only debtor*. It would have been an anomaly if the law had intended that the police board should bind itself as a debtor, and yet had not put into its hands the power to raise the means for paying its debts. That the board was not provided with the power to raise money is strongly confirmatory of the view that its function was to administer and

disburse for police purposes the fund raised under the annual apportionments without incurring the responsibility of a debtor.

It is very clear, then, that the abolition of the police board had no appreciable effect on the rights of the holders of valid warrants and certificates, whose situation remained unchanged because the police fund to which they looked for satisfaction remained unimpaired.

The law provided that all moneys paid out of the Metropolitan police fund should be so paid by warrants on the State treasurer, who was made by law the depositary and custodian of the police fund. (Sec. 27, Act 92 of 1869, App., p. 8, and sec. 1, Act 41 of 1870, App., p. 10.)

It seems clear, then, that the moment a valid warrant or certificate was issued by the police board the holder thereof became entitled to have the same paid out of the police fund, and that the performance of this duty could be compelled by mandamus, and, if necessary, the enforcement of the tax levies made for the replenishment of the police fund might be in like manner compelled by mandamus; and it is difficult to understand how the dissolution of the police board can affect the right of the holders of warrants and certificates to enforce satisfaction so long as a fund exists, actually or potentially, for that purpose.

It makes no difference in whose hands the police fund may be; it is there held, in law, for the payment of the warrants and certificates issued by the police board, and the general law seems to be entirely adequate for the purpose of securing its proper application.

This Court has laid down that the remedy at law by mandamus for the enforcement of tax levies is fully adequate, and that there is no jurisdiction in equity to afford relief of that kind (Walkley *vs.* City of Muscatine, 6 Wall., 481); and it is also well settled that a party entitled to receive payment from a public fund has the right to compel such payment by mandamus (Comm. *vs.* Johnson, 2 Binn., 279;

Apgar *vs.* Trustees, 34 N. J. (Law), 308; State *vs.* Holliday, 3 Halst., 205). So that unless this case furnishes an occasion for the enforcement of the equitable doctrine of apportionment as between parties charged with a common burden it does not seem that the bill can be supported.

But as each member of the former police district is bound to enforce the tax levies made under the annual apportionments *to their full extent*, there is no possible room for the application of the doctrine of apportionment, it not being within the competency of any court to proceed on the idea that any member of the police district is liable for less than can be raised by its tax levies.

The police fund is a *unit* as the police district was a unit, and the authorities that composed the district, being the mere agencies for raising that fund, are bound to enforce their tax levies *without regard to the changes brought about by the repealing act of* 1877. It is not perceived that anything less than an act of the legislature could authorize these authorities to stop short of a full enforcement of their respective tax levies for police purposes, and it would be a dangerous doctrine to hold otherwise. Indeed, to do so would look very much like exercising a dispensing power over a legislative enactment.

There appearing to be nothing in the case to justify the enforcement of the doctrine of apportionment, the circuit court, sitting as a court of equity, had no authority to entertain the bill.

It would seem to follow, then, from the preceding discussion that it should be answered to this question that the case is not one arising under the Constitution of the United States or cognizable by a court of equity.

SECOND QUESTION.

The warrants and the certificates held by the complainant having been issued for services rendered and supplies furnished under contract with the board of Metropolitan police when the laws required said warrants and certificates to be received by the defendants in payment of all licenses, taxes, and other dues, and all such laws having been repealed by the legislature of Louisiand without making other provision for the redemption of said warrants and certificates, was this an impairment of the obligation of the contract in relation to such warrants and certificates within the meaning of article 1, *section* 10, *of the Constitution of the United States?*

The argument above made with reference to the first question seems to go far toward meeting the demands of the second question.

We have endeavored to show by that argument that the omission in the repealing act of 1877 to name a successor or representative to the abolished police board and to provide for the redemption of the police warrants and certificates did not impair their obligation, because the general law of the State of Louisiana, which the acts of 1877 did not affect, furnishes ample means for the protection and due application of the police fund to the unpaid warrants and certificates.

If that argument is sound, it follows that the repeal of the law authorizing the receivability of police warrants and certificates did not leave their redemption and payment unprovided for.

The point presented in the second question seems substantially the same as that presented in the first, unless we are to understand that the second question calls for an an-

swer as to whether the abrogation of the law authorizing the tender of police warrants and certificates in payment of taxes and other public dues was of itself an impairment of their obligation.

But we hardly think that such a question is presented, or, if presented, that it will be answered, because it is purely *abstract*, inasmuch as the bill demands satisfaction in *money* of the warrants and certificates held by the complainant, and equity has no jurisdiction to compel the city of New Orleans to receive these warrants and certificates in satisfaction of public dues, for that is the identical mode of relief which is constantly afforded by the courts of law in mandamus.

It is quite safe to assume, then, that this Court will not pass on a constitutional question presented in this collateral way, and we will not attempt to add anything to Mr. Miller's satisfactory discussion of the point.

If, then, the constitutional argument presented under the first question is valid, the second question must also be answered in the negative.

THIRD QUESTION.

Do the pleadings show a suit to recover the contents of choses in action within the meaning of the judiciary act of 1887 *and* 1888, *so as to preclude the complainant, as assignee, from suing in the circuit court of the United States to establish a fund out of which he, in common with other creditors of the late Metropolitan police board, may be paid pro rata upon their claims?*

The argument of the complainant is that this suit is not to recover the contents of a chose in action within the meaning of the judiciary act of 1887, because the city of New Orleans is not a party to the warrants and certificates on

which the bill is founded, and therefore is not sued or liable to be sued on them, and that this bill is a proceeding collateral to the warrants and certificates for the purpose of raising a fund for their satisfaction.

But this argument proceeds on the mistaken idea, which we have already attempted to confute, that the abolished Metropolitan police board was in any way liable to suit on the warrants and certificates, whereas that board was never a debtor to anybody, but merely the administrator or disburser of the police fund provided to meet the expenses of the police department.

It was the *police fund*, consisting both of money and uncollected tax levies, that became *the sole debtor* for the expenses of the police department by virtue of the warrants and certificates issued by the board, which entitled their holders to have satisfaction out of that fund in whosesoever hands it might be, for no change in the depositary of the fund could affect the rights of such holders, which became fixed on receipt of the warrants and certificates.

The bill in this case being for the purpose of enforcing payment of police warrants and certificates against so much of the police fund as is in the hands of the city of New Orleans is necessarily *a direct suit to recover the contents thereof* against the *only debtor liable thereon*, and by operation of law the city of New Orleans holds the same relation to the outstanding police warrants and certificates as though it had formally accepted them to the extent of any part of the police fund in its hands that may be lawfully applicable to them, the repealing act of 1877 having taken away the city's authority to turn over the police fund raised by it to another.

Such being the character of the suit, and it being admitted that complainants are not the original holders of the warrants and certificates they are seeking to enforce, it would seem to follow that the bill is fatally defective in the omission to aver that the original holders of said warrants

and certificates could have sued on them in a Federal court in Louisiana on the ground of diverse citizenship or of the deprivation or denial of some Federal right, privilege, or immunity.

It is not pretended that if this suit had been brought by the original holders of these choses in action the court would have had jurisdiction on the ground of diverse citizenship, nor is it intimated or at all probable that any such original holder could have maintained this suit at the time of assigning his warrants or certificates on the ground of the invasion of a Federal right, for there is no pretense that any such right existed until *after the passage of the repealing act of* 1877, and it is extremely improbable that *any* of the warrants and claims sued on, let alone all of them, were assigned by the original holders *after* the repealing law went into effect, and when these choses in action had become discredited and, perhaps, worthless, commercially speaking.

It would seem, therefore, that the imperative language of the act of 1887, that no circuit or district court of the United States shall have cognizance of any suit by the assignee of a chose in action to recover the contents thereof "unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made," leaves no alternative to saying in answer to this third question that the failure to make the proper jurisdictional averment in the bill, as above shown, precludes the complainant and those who have united themselves with him from maintaining this suit.

The act of Congress applies to *any* suit brought by an assignee to recover the contents of a chose in action, and we do not perceive that it is possible for a Federal court to entertain a suit of that kind in any case, not excepted by the statute, where the suit could not have been brought, *for any reason*, before the assignment was made.

FOURTH QUESTION.

Considering all the allegations in the bill of complaint and the provisions in the constitution and laws of Louisiana respecting the Metropolitan police board and the Metropolitan police warrants and certificates and the redemption and payment of said certificates, does the case show a liability on the part of the city of New Orleans to contribute to a fund for the payment of said warrants and certificates beyond its liability for taxes assessed and collected in pursuance of the apportionments made?

When the legislature established the Metropolitan police district by the act of 1868 it did not, as has been pointed out, invest the board of Metropolitan police with the power to lay and collect taxes to defray its expenses, but it "*empowered and directed*" the city of New Orleans and the other members of the police district "to cause to be raised and collected" by a tax the sums of money "annually estimated and apportioned" by the police board as *their shares* of the "*total* expenses of the Metropolitan police district."

It would seem, then, that the several members of the police district were but so many agencies selected by the legislature for the purpose of raising by taxation the annual estimates and apportionments made by the police board.

It is conceived that the duty of the city of New Orleans, in common with the other members of the police district, was to lay a tax for the annual apportionment and take the proper steps to collect it, and that this was the extent of its duty in the premises.

It is a strained view of the statutes to hold that the legislature intended that the apportionments made by the police board should become the absolute obligations of the city. There does not appear to be anything in the acts of 1868 or

1869 to countenance that theory, while the act No. 16 of 1875 (App., pp. 19–24) seems to show conclusively that the legislature had no purpose to make the city a debtor for the several sums apportioned to it by the police board. Let us examine that act. It is entitled "An act to *enforce* the payment by the city of New Orleans and the several cities and parishes of the Metropolitan police district of the apportionment made upon them by the board of Metropolitan police, and for other purposes." Section 3 provides that in case the city of New Orleans or other member of the police district "shall *refuse, neglect, or be unable* to collect the tax by them or either of them levied to pay the apportionment," the police board is authorized to borrow a sum of money not exceeding the amount of the apportionment and to hypothecate "the whole or any part of the tax levied to pay the apportionment for that year." Section 4 requires the city to turn over to the board of Metropolitan police all tax bills remaining due and unpaid for that year. The act also provides (section 5) that on any such default as is mentioned in section 4 the police board may, upon proper notice, take the collection of the tax out of the hands of the city or parish in default and require payment to the treasurer of the board.

Now, when it is remembered that this act of 1875, which seems to have almost escaped the attention of complainant's counsel, was, as its title clearly indicates, an extreme measure, intended to correct what the complainant's counsel term the hostility and indifference of the cities and parishes of the police district with regard to the apportionments of the police board, it is quite remarkable, if the complainant's theory is correct, that all that was attempted by the act was to authorize the police board to take out of the hands of any parish or municipality the collection of the tax levied by it to meet a given apportionment and which it had refused or neglected or was unable to collect.

If each municipality and parish of the police district was *absolutely bound* to pay the amount of its apportionments, it

is surprising that the act of 1875 makes no reference to such liability, especially when we should have expected the act to provide a summary means for its enforcement. The silence of the act in this particular is *absolutely conclusive*, it seems to us.

It is to be remarked, furthermore, that as the act of 1875 is posterior to that of 1870, which is supposed in the opposite brief (pp. 22, 23), on very slight ground, to lend some countenance to complainant's theory, all support seems to be taken from the argument based on the act of 1870.

It may be remarked, in conclusion, that, as all the statutes touching the police board are to be taken *in pari materia*, as one statute, it is misleading for complainant's counsel to disconnect expressions and passages in those statutes from their context, as they have done, and then refer to them, whatever value they may have, as showing the legislative purpose. If the legislature should be found to have used strong expressions in certain acts whose object was to compel the members of the police district to take steps to replenish the police board's treasury, as counsel opposite say, is such language to be seized upon for the purpose of showing a change in the legislative mind as expressed in the fundamental statutes establishing the Metropolitan police district? This would be a novel way, indeed, of exploring for the meaning of a great complex system of legislation.

We will not attempt to add anything to what Mr. Miller has said with reference to the limitation imposed on the taxing power of the city of New Orleans by the State constitution, and respectfully submit that this fourth question should be answered in the negative.

It may be remarked in conclusion, that this brief is intended to be taken as supplemental and subordinate to the briefs filed by Mr. Miller.

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UNITED STATES SUPREME COURT

No. 981.

THE CITY OF NEW ORLEANS

versus

HENRY W. BENJAMIN.

Brief for the City of New Orleans, one of the Defendants.

HENRY C. MILLER,
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UNITED STATES SUPREME COURT

No. 981.

THE CITY OF NEW ORLEANS

versus

HENRY W. BENJAMIN.

Brief for the City of New Orleans, one of the Defendants.

STATEMENT OF THE CASE.

This case comes to this Court on questions certified by the United States Circuit Court of Appeals for the Fifth Circuit. The questions require some reference to the pleadings and to the law of Louisiana relating to the subject of the litigation. The questions are:

First – Does the case made by the bill alleging that the board of police had been abolished and left without a successor, or legal representative, and no provision had been made for the application of its assets to the payment of debts, and the answer herein, constitute a suit in equity under the Constitution of the United States and within the jurisdiction of the Circuit Court for the Eastern District of Louisiana, without regard for the diverse citizenship of the parties.

Second—The warrants and certificates held by the complainant having been issued for services rendered and supplies furnished under contract with the Board of Metropolitan Police, when the laws required said warrants and certificates to be received by defendants in payment of all licenses, taxes and other dues, and all such laws having been repealed by the legislature of Louisiana without making other provisions for the payment of said warrants and certificates, was there an impairment of the obligation of the contract in relation to such warrants and certificates within the meaning of Article 1, Section 10, of the constitution of the United States?

Third—Do the pleadings show a suit to recover the contents of choses in action within the meaning of the judiciary act of 1887 and 1888, so as to preclude the complainant, as assignee, from suing in the Circuit Court to establish a fund out of which he, in common with other creditors of the late Metropolitan Police Board, may be paid pro rata upon their claims?

Fourth—Considering all the allegations in the bill of complaint and the provision in the constitution and laws of Louisiana respecting the Metropolitan Police Board, and the Metropolitan Police warrants and certificates, and the redemption and payment of said certificates, does the case

show a liability on the part of the city of New Orleans to contribute to a fund for the payment of said warrants and certificates beyond its liability for taxes assessed and collected in pursuance of the apportionment made?

The bill of complaint, demurrer and answer of the city of New Orleans, together with copies of warrants, certificates, pay-rolls and assignments, forming the basis of the plaintiff's demand, are made part of the transcript.

The bill of the Complainant, Henry W. Benjamin, against the city of New Orleans, of Kenner and of the parishes of Jefferson and St. Bernard, seeks to compel the payment of Metropolitan Police warrants and certificates amounting to Five thousand and thirty-two dollars, and of similar obligations to a much larger amount held by others who have intervened.

These warrants and certificates for the pay of policemen and police expenses were issued by the Metropolitan Police Board, a municipal corporation created for the Police government of New Orleans, of Kenner and the parishes of St. Bernard and Jefferson, the defendants in the Circuit Court. These obligations clearly choses in action, made by this municipal corporation are not payable to bearer, the warrants are payable to the order of, and the certificates to the policemen or

creditors to whom they issued. They are sued on by Complainant and others as assignees or subsequent holders. (Bill, par. 8, 15, 16, Record No. 981, pages 10, 15 and 16), with no averment as to the citizenship of the assignor, the original holders. As to the policemen required by law to be citizens of Louisiana, (Act of 1868, section 8th, appendix p. 1), it is manifest the required jurisdictional averment could not have been supported if made. It is enough that the averment of the citizenship of the assignors is not made with respect to any of the originai holders. The City moved to dismiss the suit as not within the jurisdiction of the Court. Act 3rd March, 1887; 24th Statute at Large, page 552 of 13th August, 1888; 25th Statute, page 454; Act of Congress, March 3rd, 1875, 5th section, 18th Statutes page 472; 129th U. S., page 326; 109th U. S. page 353 et seq.; 105th U. S. page 669; 138th U. S., page 694; 127th U. S., 325. To solve this question (the 3rd) enough, it is believed, if answered in the affirmative to dispose of the case, reference is needed only to the bill and obligations, the forms of which are brought up with the certificate. Printed Rec. 7

The jurisdictional question, it is submitted, has been adjudged. Ibid and 33d Fed. Reports, 197; 52d Fed. Reports, 177.

In the Circuit Court the Complainant contended his suit is *not* on the warrants and certificates for the payment of which the bill is filed. That pretension must find its answer in the bill. His other contention was that irrespective of the prohibition of suits by assignees in the Circuit Court, the bill made a case arising under the Constitution of the United States. It is manifest if the Court finds from an inspection of the bill, that the suit is by an assignee on the warrants and certificates, with no averment as to the citizenship of the assignors, the suit must be dismissed, unless the Court holds that the exclusion of jurisdiction of such suits does not apply when the bill alleges a case arising under the federal constitution. The case connected with this third question is hence stated first, to save the time of the court, if that question is answered in the affirmative.

If at all requisite, to go beyond this issue presented by the 3rd question ~~of jurisdiction~~ then some further examination of the bill and answer, and of the law becomes requisite for the solution of the first and second questions, whether the bill states a case coming under the Constitution of the United States forbidding State legislation impairing contracts.

The bill charges the city of New Orleans and the other corporations in the Police District were bound for these warrants and certificates and that by the Act of the Legislature of Louisiana, No. 35 of 1877, the contract of the warrant and certificate holders was impaired in violation of Article 1, Section 10 of the Constitution of the United States. The alleged impairment is thus charged in bill; the repeal by this act of 1877 of the laws, making the warrants and certificates receivable for all taxes, licenses and dues of the cities and parishes within the Metropolitan Police District, and requiring such cities and parishes to pay or provide the means of payment to the Police Board of the amounts of the apportionments against them for Police expenses, out of which funds only the creditors were entitled to payment, and by the abolition of the Police Board, and no provision made for the liquidation of its affairs or payment of its debts. Bill, Paragraphs 10 and 11, Record, No. 981, page 11.

The inquiry whether the contract of Complainant has been impaired requires an examination of the legislation from which the asserted contract is deduced. The provisions of law making up the asserted contract ascertained the effect of the Act of 1877, upon it will be considered. By the Act No. 74 of 1868, the maintenance of

the police for the district created by the act of New Orleans and Kenner, and the two adjacent parishes was confided to the Metropolitan Police Board with power to issue warrants and certificates for the pay of the police and other expenses. These expenses were to be borne by the cities and parishes of the district, and apportionments or estimates of their expenses were to be made annually by the Board against each of these cities and parishes, these apportionments or estimates made in advance of the fiscal year, and notified, were to be binding on the cities and parishes, and each was to levy and collect taxes for the police expenses apportioned, and pay these taxes when collected to the Police Board to defray the police expenses, including of course, the warrants and certificates. To this summary of the contract obligations of the holders of the Metropolitan warrants and certificates, the Complainant in the lower Court contends another is to be added, that irrespective of the taxes to be levied, the city was a debtor for the apportionments. Were the contract provisions of the act of 1868 in any respect assailed by this act of 1877 is the enquiry. In this connection the admissions in the bill deserve attention, that when the act of 1877 was enacted the apportionments had all been made, the Metropolitan Police taxes to pay them had been levied, and "ever since"

the act of 1877, the Metropolitan Police taxes continued to be collected and applied by the City to pay the warrants and certificates. (Bill, Paragraph 4, 12, 14, Record No. 98, page 9, 11, 12.) The bill also recites that on the application of the warrant holders the State Court appointed a receiver who collected from the City and distributed to the holders of these obligations, $30,000 of the taxes collected. Bill, Paragraph 14, Record, page 12. The bill alludes to another suit in the Federal Court brought by these creditors which failed, not however, because of the act of 1877, but for want of jurisdiction quite apt to be the difficulty in this case. This analysis of the provisions contained in the law relied on as the contract of complainant, (Act of 1868, Appendix, page 1. Act 1869 substantially repeated in the Act of 1869, Appendix, p. 6), is pertinent to the issue, whether this act of 1877 disturbed the apportionments or the tax levies to pay the warrant holders, and the enquiry is greatly facilitated by the admissions in the bill of the continued enforcement "ever since the act of 1877" of the police taxes levied for the benefit of these creditors who asserting the deprivations of their contract rights. The Legislature made another provision to which reference is made in the bill, for the redemption of these warrants and certificates. The legislative

acts of 1869 and 1870 required that the cities and parishes composing the Police District should receive Metropolitan warrants and certificates up to the amount of the apportionments against them in payment of all taxes, licenses and dues. Act No. 44 of 1869, appendix page 9. Act No. 41 of 1870, appendix page 10. This legislation, it is to be presumed, proved inconvenient. These warrants issued in profusion and of course, in advance of the Police tax collections were apt to be tendered in large amounts at the beginning of the fiscal year, so that the City instead of collecting its taxes in money needed for all municipal purposes would collect merely in warrants and certificates. This was embarrassing to the city. On the other hand the settlements of the City with the Metropolitan Police Board for the Police taxes collected were likely to be made not in money, but in Metropolitan Police warrants and certificates. This did not suit the Board. They preferred to receive in cash the Police taxes. Hence, in 1874, three years before the act of 1877, the legislature enacted that all Metropolitan Police taxes should be collected in cash and paid to the Board in cash. This legislation largely restricting the receivability of warrants and certificates for taxes, licenses and dues, was accompanied with the proviso that warrants and certificates issued for years prior to

January 1, 1874, should still be received for taxes, licenses and dues for the years prior to 1st January, 1874. Act No. 33 of 1874, sec 4th, appendix page 17. These police obligations thus made receivable only for past taxes were of course of greatly diminished value. But the Constitution of the State adopted in 1880, with the view of absorbing all extant municipal scrip for police or other expenses, made all such scrip receivable for all taxes and licenses due any municipal corporation for all years down to 1879 (Constitution Miscellaneous Ordinances, Appendix, page 37.) a greater right than conferred by the Metropolitan Police acts which made the warrants and certificates receivable only for the years of the apportionments, i. e. down to 1876, when the Board was abolished. The bill it is to be observed makes no allusion to the provision for the redemption of the warrants and certificates contained in the Constitution of 1880. Nor, indeed, for obvions reasons does it claim any relief in respect to the tender of warrants and certificates. It seeks other relief. Prayer, record, No. 981, p. 13. This review of the legislation relating to these Metropolitan warrants and certificates, and this reference to the Constitution of 1880, will, it is believed facilitate, the Court in solving the issue, whether this act of 1877, now to be more particularly considered, affords the Complainant any conceiv-

able basis to urge the deprivation of any right in respect to the receivability of these police obligations for municipal taxes and licenses, a receivability abridged sensibly long before the passage of the act of 1877: to reinstate to a greater extent than it ever existed, by the Constitution of 1880, and a supposed right discarded in the prayer of the bill.

The act No. 35 of 1877, Appendix, page 24 was passed to change the police system of New Orleans. The police functions had down to 1868, always been exercised by the city of New Orleans, under its charter granted sixty years before. The charge of the Police was taken from the city by the Act of 1868, creating the Police District and vesting the maintenance of the Metropolitan Police in the Police Board to be appointed by the Governor. Acts 68, Appendix, page 1. To accomplish the purpose of changing the police system, the act repealed all the law relating to the Metropolitan Police of 1877, and transferred the police functions back to the city. That which was taken away in 1868 was restored in 1877. Besides, the consideration of greater police efficiency, it is to be presumed moved the legislature, the economic motive for the change is suggested by the provision

in the Act of 1877, restricting the annual expense of the Police to $325,000 in marked contrast with $760,000, the average annual apportionment for police expenses made by the Metropolitan Police Board during the eight years of its existence. Bill stating the annual apportionments, Paragraph 4, Record, page 9. When this act was passed there were outstanding warrants and certificates of which those sued on are the residue unpaid. The assets of the Board consisted as the bill puts it, of the amounts due by the city under the apportionments. It would be more correct to say the uncollected Metropolitan taxes, the provision made to pay these apportionments. But when the Act of 1877 was passed, it is expressly admitted by the bill, the apportionments of the Police Board had all been made, and the Metropolitan Police taxes, under the apportionments had been levied to pay the police expenses, including the warrants and certificates. These apportionments and tax levies and all remedies to compel, if neccessary the application of the Metropolitan taxes to pay the warrants and certificates were left in force by the act, as is apparent from its perusal. Here, again occurs the significance of the admissions in the bill, "ever since the act of 1877," of the continued collection and application of the Police taxes for the benefit of the warrant and certificate

holders. Bill, par. 12 and 14, Record, pp. 11, 12. It appears too, from the bill that the State Courts afforded all the relief asked by the creditors after the act of 1877. Thus it is stated that the State Court appointed a Receiver who received from the City and distributed $30,000 of these Police taxes collected. Another suit was brought by the creditors in the U. S. Circuit Court, Bill, par. 15th. That suit failed, but not because of the act of 1877. 38 ~~Fed~~ Federal Reporter, page ~~827~~ 828. The Act of 1877, it is manifest interposed no obstacle to to the assertion of the rights of these creditors either in the State or Federal tribunals. The act of 1877 did not cancel the apportionments or the police taxes levies already imposed for the redemption of the warrants and certificates, nor take away any of the remedies afterward freely exerted by the creditors. It announced no purpose to interfere with any rights. Its mission was to change the Police system. To do this the laws establishing the Metropolitan Police were repealed and the police functions restored to the city to be exerted under its charter.

It is this Act of 1877 to supersede the existing police system and organize another that the bill assails as forbidden by the Constitution of the United States. The Act is assailed because it left no successor, for the Police Board displaced with the

Police system of which the Board was a part. In full view of the apportionments and the tax levies and remedies left untouched, and of which all creditors of this Board have had the full benefit, after as before the Act of 1877, the act is assailed as impairing the contract of the creditors. It is the Police legislation for the city of New Orleans, that it is claimed in the bill invaded the creditors contract and produced a case arising under the Constitution of the United States.

A bill to compel the distribution of taxes collected for municipal bond or warrant creditors, and withheld, is of ready appreciation. This is no such bill. The bill asserts that the city of New Orleans, of Kenner, and the parishes of Jefferson and St. Bernard were debtors for the amount of the apportionments against them made by the Police Board during the eight years, of the existence of the Board, that after crediting all payments of Police taxes collected, the City of New Orleans still owes on these apportionments nine hundred and forty thousand three hundred and seventy-nine dollars, the amounts due by the other corporations in the Police District not being stated. It is this amount claimed to be due by the city of New Orleans, the

bill treats as a fund to be distributed. The bill prays they each be decreed to pay their shares of the extant warrants and certificates. The fourth question requires an examination of the nature of the liability created by these apportionments. Was the city bound for the amount of the apportionment or bound only to levy and collect and pay over the Police taxes? The answer insists that the apportionments were simply and only estimates made in advance of the police expenses, and intended only to furnish the measure of the police taxes to be levied. Hence, the language of the acts that the cities and parishes notified of the apportionments shall levy the Police taxes up to the amount of the apportionments, and pay the taxes collected to the board. Acts 1868, Section 27, 29, 30; Appendix, pages 2, 3; Acts 1869, Section 25, 27; Appendix, page 8; Acts 1874, Section 2, 4; Appendix, pages 15, 16. If the city was not a debtor for these estimates, but bound only to levy and pay over the Police taxes, the bill fails, for it is framed on the theory the City owed the apportionments. Hence, the third question: is the City bound to contribute to any fund beyond the Police taxes collected. The bill itself furnishes cogent reasons, why the City was not bound for the amount of the apportionments. The entire debt of this Police Board remaining unpaid is stated by the

bill not to exceed $200,000, admitted to be greatly less than the amount claimed to be due by the city alone. It is proper to state the debts actually proved before the master was $130,000. Yet, the bill sums up the amount unpaid of the apportionments at $940,000. Thus, on the theory that these apportionments were debts, the liability of the city is eight hundred thousand dollars more than the debts for payment of which only, the apportionments made and the taxes levied. Bill, Par. 7, page 10; Record, Par. 17, record, p. 13. True, the prayer of the bill asks that the City pay the amount requisite to discharge the debt. But still it remains that the apportionments stated in the bill did exceed largely all debts to be paid. How, then can it be said the city owed the apportionments. These apportionments were "estimates," the largest margin was allowed, and the result exhibited by the bill demonstrates that as estimates, they were grossly excessive. It would seem to follow, that the liability of the city is as suggested by the fourth question, only to the extent of the Metropolitan Police taxes collected.

The prayer of the bill perhaps deserves attention, as the questions seem to imply that the jurisdiction of the Circuit Court may be deemed

affected by the relief sought. The bill prays for an account of the debts of the Police Board, including the warrants and certificates held by Complainant, as well as other holders, that treating the apportionments as debts, a like account be taken of the amounts due by the cities and parishes, and of the tax collected, that such indebtedness be paid to a receiver and distributed to the creditors. Record, pages 13, 14.

There was a demurrer to the bill with the special cause assigned, that the provision for payment of the warrants and certificates were the taxes directed to be levied, and if it were true that no provision existed for payment of the obligations, then the Courts were powerless to grant relief. Record, page 14. The demurrer overruled the answer was filed containing substantially, the defence of res judicata based on the judgment of the Supreme Court of the State of Louisiana, in Harrisson, Receiver vs. New Orleans; that the city of New Orleans was not a debtor to the Police Board as alleged in the bill, but liable under the legislative acts only for the Metropolitan Police taxes collected, and had accounted for and paid over all the tax collections, and the answer further maintained the validity of the Legislative Act No. 35, of 1877, assailed in the bill as impairing the asserted contract of the holders of the warrants and certificates.

Answer, Printed Record, page 16, et seq. At a later stage of the controversy, the City moved to dismiss the suit because brought by assignees of choses in action with no averment of the capacity of the assignor to sue if no assignment had been made, and no such averment could have been sustained if made, and on the ground also that the suit by the complainant, an alien was really for the benefit of citizens of Louisiana incompetent to sue, and the rules to dismiss required the court, if in any doubt in furtherance of justice, and to protect its jurisdiction to refer to the Master, the issue as to citizenship of the real parties interested. See original Record, pages 119, 121 brought up with the certificate.

The judgment of the Circuit Court condemned the city to pay its proportion of $129,000, the amount of the extant warrants and certificates.

On the appeal of the city of New Orleans to the Court of Appeals, the questions were, and are certified, stated at page 1 of the brief.

ARGUMENT.

The first question, whether the allegations in the bill of the abolition of the Police Board leaving no successor or legal representative, and no provisions for the application of the assets to payment

of the debts of the board. it is submitted, suggests no case arising under the contract provision of the Constitution of the United States. Record, page 6. The conditions supposed by the question are not infrequent. In that class of cases, the State tribunals administer relief by the appointment of Receivers to collect the assets and pay the corporate creditors. That was the relief sought and obtained by these creditors in the State Court. It has not been supposed, that because there are assets and debts of a dissolved corporation, that therefore the creditors suit to obtain payment of his debt arises under the Constitution of the United States. If such cases were within the scope of the contract provision, or any other article of the Constitution, the liquidation of insolvent corporations would be in a great measure turned over to the Federal Courts. In this view alone, the question should be answered in the negative.

Again, after the act of 1877 alleged to have left no successor to the Metropolitan Board the City of New Orleans remained for all purposes important to creditors, the successor of the Board. The bill admits the Board itself had no assets save the amounts alleged to be due by the cities and parishes under the apportionments. Bill,

par. 17th, Record, page 13. If it were true the City owed the apportioments, there was no attempt in the act of 1877 to discharge the City or deprive the creditor of his remedy in that respect. The City stood after the act of 1877 in the same relation of liability as before. If it be said that the abolition of the Board deprived the creditors of the instrumentality of the Board to sue for the apportionments, still there remained the more expeditious and adequate remedy of the suit by the creditors in their own right. How then in this aspect could the abolition of this Board leaving the City to respond for its asserted liability impair the contract of the creditors in any appreciable sense, and produce any sort of contention arising under the Constitution. On the other hand, when this Board was abolished as the police apportionments had all been levied, and in course of collection and application to pay the warrants and certificates, the Act of 1877 left the City to respond to any complaint of the creditors with reference to the collection and application of taxes to pay the warrants and certificates. If it be said that the redress for any wrong in connection with the application of the taxes, could have been sought by the board itself, but for its abolition, the answer still is that the Act of 1877 did not affect in the least the remedy the creditors

themselves could exercise, quite as efficient and certainly more direct. See High on Mandamus, Section 374 et seq. Dillon on Municipal Corporations, Section 2. Maenhaut vs. The City of New Orleans, 2 Woods Reports, page 112. In point of fact as the bill itself shows, the creditors had not the slightest complaint in respect to accounting for the police taxes to urge against the city. Bill, paragraphs 12th and 14th. Record, pages 11 and 12. When the board was abolished, its important function of making the apportionments the basis for the police taxes had been fully performed. The taxes as already stated had been levied. Provision had thus been made for the payment of the warrants and certificates. There remained nothing to be done except for the City to collect and apply the taxes. Notwithstanding, then the abolition of the board, there remained the city of New Orleans, if not the successor, at least representing the Board in respect to all demands of the creditors There was then, it is submitted, for all reasonable purposes, a successor to the Board in the city of New Orleans.

There is still another aspect of this question. It is not uncommon for the legislature to alter the modes and instrumentalities of municipal government. The act of 1877 was legislation of that character. It abolished the police organiza-

tion established in the year 1868, and vested in the City the function of maintaining the police. This Metropolitan Police with its district organization, the governing power vested in a Board appointed by the Governor of the State, the board consisting of a President, a Vice-President and Five Commissioners, the force provided with a roll of officers, superinteudents, captains, subordinate officers surgeon and telegraph operators, constituted an elaborate and certainly a costly establishment. See the act of 1868, appendix, page 1, section 2, 50, 54. The apportionments and consequent taxation to support this police, averaging for the eight years of its existence over seven hundred and sixty thousand dollars per annum, furnished a strong argument to get rid of the Metropolitan Police and restrict the expense of the new police to the maximum of Three hundred thousand dollars per annum. See that Act of 1877, Appendix page 24. The act is to be accepted as the legislative judgment against the Metropolitan Police system as oppressive in ~~amount~~ point of expense, and on other grounds of public good. Is this legislation with reference to the police of the City to be now assailed as prohibited by the Constitution of he United States? The act is merely the exercise of the police power always deemed to be reserved by the State, and to which power even contract rights are subordinated.

See the Beer case, 97th United States Reports, page 25. The exigency of the Complainant's case substantially, demands that this Court shall hold that because there were unpaid police warrants and certificates when the act of 1877 was enacted, therefore the Metropolitan Police and the Police Board could not be abolished in whatever degree that abolition might have been demanded by public policy; or at least, the Complainant's case requires that a successor or legal representative should have been appointed to take the place of an abolished Board. It must occur to this Court, that if the legislature had power to legislate with reference to the police of the City, it had the right to abolish the Metropolitan Police Board along with the Metropolitan Police, and there was neither reason or obligation to create a successor for the superseded Board. It therefore, is a mere incident of the exercise of the police power of which no one, creditor or not, could complain that the Police Board was abolished. It injured no one, and in any aspect it afforded to no one any cause of complaint. The abolition of the Board then to the act of 1877, could give rise to no controversy, least of all to a suit, arising under the Constitution of the United States.

Whether the bill states a case of Equity cognizance: 1st question, Rec. page 6, is an important,

if the controversy does not arise under the Constitution of the United States. The liabilities of the Police Board, i. e. the extant warrants and certificates it is charged in the bill, are to be borne pro rata by the cities and parishes composing the Police District. In this view, the suit is against four defendants, each for his part of the alleged debt. There is no room for any pro rata distribution among the creditors in view of the allegation in bill that the amount alleged to be due by the Cities and parishes exceeds the total debts to be paid. Bill, Paragraphs 4th, 5th, 6th, 17th, Record, page 9, et seq. Prayer, page 14. The nature of the bill in these respects does not indicate any reason for a resort to equity. The bill states the provision made for the payment of the warrants and certificates, i. e. the apportionments against the Cities and parishes, and the Police taxes levied to pay the creditors. Bill, Paragraphs 2d, 4th, 5th, 7th, 12th, Record, page 9, et seq. From first to last in the bill, there is no averment of the insufficiency of these taxes to pay the creditors. On the contrary the bill avers the action of the City in enforcing the collection and application of the police taxes and at the date of the filing of the bill, there was a large amount of these taxes on hand applicable to payment of the warrants and certificates. Record, page 12. To sustain the Equity jurisdiction, it is

absolutely essential, the bill itself must show the inadequacy of the provisions made by law for the payment of the debt. Again, there is the Constitution provisions that the warrants and certificates shall be receivable for all taxes and licenses, a method of redemption provided by the acts under which the obligations issued. Constitution of Louisiana, Miscellaneous Ordinances, Appendix, page 37. There is no semblance of any averment in the bill, that this means of redemption has ever been denied by the officials or by the Courts. If denied, the remedy by mandamus was complete, and could have been availed of by every warrant holder. 102 U. S., pages 672, 685, et seq. It is manifest, that the bill does not show the insufficiency or exhaustion of the provisions made by law for payment of these obligations, or any other reason to invoke the Equity jurisdiction.

In all aspects the first question must be answered in the negative. i. e. the bill states no case in Equity arising under the Constitution of the United States.

The second question certified as to the character of this act of 1877, in another aspect is thus stated. The warrants and certificates held by Complainant having been issued for services

rendered and supplies furnished under contract to the Police Board when the laws provided the warrants and certificates should be received for taxes, licenses and dues, was the repeal of such laws by the act of 1877 without making other provisions for the redemption of such warrants and certificates an impairment of the contract of the holders of these obligations within the meaning of Art. 1, section 10, of the Constitution of the United States.

To determine whether the act of 1877 impaired the contract, the laws relating to the contract and and the remedies to enforce it, subsisting at the time of the alleged impairment requires examination. The impairment supposed by this question relates to the means of redeeming the warrants and certificates and suggests whether by this act of 1877 there was such a modification or withdrawal of these means as to bring the act in conflict with the contract provisions of the Federal Constitution. The act was not obnoxious to Article 1, section 10, of the Constitution, merely because the act itself did not provide for the redemption of the obligations. If this act left in force substantially the modes of payment of the warrants and certificates provided by existing laws, there was no impairment.

The apportionments of the the Police Board

against the cities and parishes already made and the taxes already levied and in course of collection to pay the creditors of the Board, and the remedies to compel the proper application of the taxes were it has been shown, wholly unaffected by the act of 1877.

The tender of warrants and certificates for taxes, licenses and dues had been abridged long before the act of 1877. Against the Act No. 33 of 1874, the bill makes no complaint. That act stopped the tender of warrants and certificates for the Police taxes. The proviso reserved the right to pay in warrants and certificates taxes, licenses and dues for years prior to 1st January, 1874. Act No. 33 of 1874, Section 2d, 4th, Appendix page 16. What remained after the Act of 1874 of the receivability of these warrants and certificates, i. e. the right of tender for past taxes had ceased to be of any importance when the bill was filed, and doubtless, long before. For as years passed by the chances were of course diminished of using these warrants and certificates in paying old taxes. Hence, the bill itself, does not even claim the right supposed by the question to have been taken away. In the Virginia Coupon cases the complaint was that the State would no longer take the coupons for taxes. The relief asked, conformed to the complaint, i. e. that the

State should be compelled to receive the coupons for taxes. See the Virginia cases, 102 United States Reports, page 672; 14th United States, page 269; But this bill does not seek to compel the City to receive the warrants and certificates. That is exactly the kind of relief that the Complainant does not wish. The bill asks that the warrants and certificates be paid in cash, under the theory that the City owes the amounts of the apportionment. This Court cannot hold the contracts has been impaired because of the supposed deprivation of a right rejected by the complainant himself. See the prayer of the bill, Record, page 13.

If this Act of 1877 had undertuken to deprive the creditors of any appreciable right in respect to the tender of warrants and certificates, still they would have had no cause of complaint. The State Constitution of 1880 gave the right to pay in Metropolitan warrants and certificates, all municipal taxes, licenses and dues for all years down to 1879. If therefore the Act of 1877 had taken away any right in this respect, the act was superseded and at the date of the filing of the bill the right was fully reinstated by the organic law. Indeed, the Constitution of the State enlarged the right. It was only taxes, licenses and dues for the years of the apportionment, i. e. from 1868 to 1877 that could be paid in warrants and certificates. Act No. 44

of 1869; No. 41 of 1870. Appendix, page 9, 10. Under the Constitutional provision payment could be made in warrants and certificates of the taxes and licenses of all years down to 1879. Courts do not entertain fictitious grievances. The Constitution of the State in force when the bill was filed, more than redressed any possible injury, if in this or any other respect, the Act of 1877 had ever afforded the vestige of cause of complaint. This Court has held that if the legislation alleged to impair the contract has not been so construed by the State Courts, there is no basis for any suit. 129th U. S., pages 38, 41. Here, there is no pretence of the denial of any right by the State Courts. There was no foundation forsuch pretension. 40th Louisiana Annual Reports, page 509; 29th Louisiana Ann., page 787. The bill does not undertake to aver the refusal at any time or under any circumstances of any Metropolitan warrants or certificates tendered for any tax or license or dues. No such averment could have been made, since under the organic law of the State the right in this respect was secured in greoter plenitude, i. e. in a greater than given originally.

Something more is required to invoke the jurisdiction of this Court, than the mere allegation of the violation, the contract right secured by the

Constitution of the United States. This allegation was an attempt to maintain a suit brought by an assignee of choses in action, in the teeth of the restriction as to suits by assignees already discussed. It was supposed the difficulty of maintaining, the suit would be obviated or lessened, if there was an averment of the impairment of a contract right. It can hardly be appreciated, how the right of an assignee of a chose in action to sue in the Circuit Court can be affected by allegations, he chooses to introduce of the deprivation of a contract right. His right to sue is subject to the conditions only, prescribed by the act of congress. But the Court will not accept without examination, an allegation of an impaired contract. If it finds no such impairment exists, the allegation is unavailing, and the suit will be dismissed. Here, there is no violation of the contract by the law of Louisiana. The absence of any such element in the case is exhibited by the legislative acts. It is manifested by the bill, and confessed by the prayer for relief. 129th U. S., 36; 109th U. S., page 341, and the citations might be extended, in which this Court has disregarded allegations merely colorable to give jurisdiction.

It is then plainly manifest that the 2d question admits of no other than a negative answer. The act of 1877 took away no rights, at least none

in the appreciation of the Complainant himself, manifested by his prayer for relief, surely the best test, and the Constitution in force when the bill was filed gave more than the Complainant could ever claim under the acts which originally gave the right.

The 3rd question is whether the pleadings shows a suit by an assignee to recover on choses in action within the meaning of the judiciary act, so as to preclude the Complainant from suing in the Circuit Court to establish a fund from which he in common with other creditors can be paid pro rata on their claims.

That the obligations sued upon are choses in action needs but the statement. 105th U. S., 665. 9th Wallace, page 390. That they are sued on by an assignee, admits of no dispute. The obligations issued to policemen and creditors of the Board. The first experiment with the jurisdiction of the Circuit Court was by Goldstein suing as assignee. That litigation met discomfiture. 38 [illegible] 626. The second experiment on these same warrants and certificates is this suit in Benjamin's name, suing also as assignee, acquiring it is alleged, since the failure of the Goldstein suit. Bill, par. 8, 15, 16; Record, pp. 10, 12. As to the

policemen, the original holders of the obligations, the law required them to be citizens of Louisiana. Act of 1868, Section 8th, appendix, page 1. As to neither the policemen or other creditors of the Police Board to whom the warrants and certificates issued, is there the indispensable jurisdictional averment in the bill, that the assignors could have sued in the Circuit Court. What is it then, that can take this case out of the prohibitions of suits in the Circuit Court by assignees of choses in action, unless the assignors could have sued, and unless the bill alleges of the capacity to sue of the assignors? Acts of Congress of 3rd of March, 1887, section 1; 24th Statutes at Large, page 552, of 3rd of August, 1888, section 1; 25th Statutes ot Large, page 454; Turner vs. Bank, 4th Dallas, page 8; Morgan vs. Gay, 19th Wallace, page 81. 105th U. S., page 666; 109th U. S., page 354.

The Complainant's contention on this point is understood to be, that his suit is not on the warrants and certificates. On what then is it based? Without the allegation in the bill that he is the holder of the warrants and certificates, he would have no suit at all in court. As observed by this Court in a decision as to the basis of the suit. Without this cause of action, i. e, the warrants and certificates, the Complainant would have no

standing in court and no right to ask the Court to inquire into the other matters alleged in the bill. 104th United States, page 248. In this case whatever the other allegations in the bill, it is the warrants and certificates that afford the Complainant his cause of action. It is on these that the Complainant sues. Where the chose in action is a mere link in the chain of title asserted, the chose in action, is of course, not the basis of the suit. Thus, if a note or bill is assigned, and the assignee recovers judgment on the note, he may sue in the Circuit Court on the judgment, i. e. may file a creditors bill, irrespective of the citizenship of the assignor of the note. In such cases the chose in action is a mere element or link of title. The holder of the judgment does not sue on the chose in action assigned, but on the judgment in his own favor. Bean vs Mason, 2d Mason, page 252; Ober vs. Gallaher, 93d United States, page 206. This type of cases was relied on by the other side, but they give him no support. Here, there has been no merger of the chose in action in a judgment. The suit is on the warrants and certificates. Again, it has been held that the assignee of an action in damages, or the assignee who sues for property conveyed to him, is not within the prohibition of jurisdiction of suits by assignees. Corbin vs

County, 105 U. S., page 665; 9th Wallace, page 387; 5th Howard, page 449; 16th Howard, page 622. Nor do cases of this class aid the Complainant. He does not sue for damages or for property. He sues to recover the amount of the warrants and certificates. The Complainant still struggling to distinguish his case from that of an assignee suing on a chose in action contends he sues to establish a fund out of which Metropolitan warrants and certificates are to be paid. This classification of his suit exhibits ingenuity. The bill asserts the cities of New Orleans, of Kenner and the parishes of Jefferson and St. Bernard were all bound for the annual police expenses, each in the proportion fixed by the apportionments of the board. The suit in this view is directed against these four obligors, and the bill asks for a decree against each, for its proportion of the amount requisite to pay the outstanding warrants. This perhaps, may be described as suing to establish a fund: but it is not the natural designation of the suit. Whether to establish a fund or not, the suit is for payment of the warrants and certificates. A suit against four makers of a promissory note in favor of several payees, might be termed a suit to establish a fund for payment of the payees. But the term would not make it less or more, than a suit to recover the amount of the note. So in this case, the description the

Complainant undertakes to give his suit as one to establish a fund, does not change the basis or object of his suit. The basis at last, is the warrants and certificates. The object is to obtain their payment. A suit for payment of the note, bill, warrant or certificates, or other chose in action, is it is submitted, within the natu
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in action. That is the Complainant's suit, and he sues as assignee. It is simply a refinement of words to make any distinction between the Complainant's suit, and that brought by an assignee of a chose in action,

It is difficult to appreciate that the jurisdiction of suits in the United States Circuit Court by assignees of choses in action, is at all affected by the allegation of the impairment of his contract, or by the nature of the relief sought by the Complainant. The Act of Congress gives jurisdiction to the Circuit Court of all suits at law or in equity, between citizens of different States, and of other controversies including all suits arising under the Constitution of the United States. But all the jurisdiction thus given is qualified by the absolute exclusion of all suits brought by assignees of choses in action, unless the assignors could have sued if no assignment had been made. 25 Statutes at large, page 434, Section 1. The policy for this exclusion is well stated in 9th

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Wall, page 392. The introduction in the bill of the allegation of impairment of the contract, even if it had any foundation, has not the least influence on the issue of jurisdiction. What more influence has the relief sought? The relief prayed is an account, a Receiver and a distribution to creditors of the amounts claimed to be due by the cities and parishes prayed. Page 11. Conceding, for the purpose of the argument, that the bill makes a case for equitable relief, what possible weight does that exert on the issue of jurisdiction? Whatever the allegations, whether of an impaired contract or of any other nature contained in the bill; and whatever the relief asked, whether legal or equitable, the prohibition is still the same; that no assignee of a chose in action can sue in the Circuit Court, unless the assignor could have maintained such suit. The nature of the relief sought, or whether by action at law, or suit in Equity, it has been held, has not a particle of influence as to the restriction of suits by assignees. 8th Howard, 441; 105 U. S., page 659; 109 U. S., page 354.

Nor can the Complainant bring his case within any of the exceptions contained in the Act of Congress, as to suits by assignees. The exceptions are: suits on foreign bills of exchange, and municipal obligations payable to bearer. 25th Statutes

at large, page 434, Section 1; 33rd Federal Reports, page 196. The obligations sued on are not payable to bearer, they require assignment and are sued on by the assignee. The present judiciary act not only contains the prohibition of suits by assignees, but of any subsequent holders of the chose in action. The addition was first made in the act of 3d March, 1887, 24th Statute at large, page 454. The obligations sued upon are then clearly, not within the excepted choses in action. Indeed, the question of jurisdiction of the suit on these choses in action is hardly to be deemed open. The first suit on these obligations in the name of Goldstein, (Bill, paragraph 15, 16, Record page 10), brought in one of the State Courts, was under the removal statutes then in force, attempted to be removed to the Circuit Court. The institution of that suit in the State Court, was a confession there was no jurisdiction in the United States Circuit Court. The Circuit Court dismissed that suit, assigning as one of the grounds that the suit could not have been brought originally in the Circuit Court. Goldstein vs. New Orleans, 38 Federal Reports, page 624. In another case the suit was by an assignee, a citizen of Louisiana, against the City, upon the warrants drawn on the city treasurer. The decision was the Circuit Court had no jurisdiction because of the prohibition of jurisdic-

tion in the judiciary act as to suits by assignees. Neugass vs. New Orleans, 33d Federal Reports, page 196. See also Cloud vs. Semas, 52d Federal Reports, page 177; 105th U. S., page 341, 356.

It follows therefore that this suit, brought by an assignee, with no averment of the citizenship of the assignor, is not within the jurisdiction of the Circuit Court, notwithstanding the other allegations or the prayer of the bill, and hence, the 3d question must be answered in the affimative.

The fourth and last question certified relates the liability of the City under these Metropolitan Police acts, i. e., whether liable to contribute to any fund for payment of these warrants and certificates beyond the Metropolitan Police taxes collected. Record, page 6. The question implies the right of the Complainant to the distribution of any police taxes collected by the City. But the bill asks no such relief. It undertakes to assert the apportionments or estimates of the police expenses are debts of the City, for the payment of the warrants and certificates. The answer insists these estimates never were debts, in no sense constitute any fund for creditors, and all for which the City was ever liable were the Metropolitan Police taxes collected. Hence, the question whether

there is any liability of the City to contribute beyond the police taxes collected.

The Metropolitan Police acts present these apportionments and estimates as designed only to furnish the measure of the Police taxes to be levied for payment of the apportionments. The acts direct that the Police Board shall make the apportionments and upon notification, the cities and taxes shall proceed to levy and collect the Police taxes up to the amount of the apportionments, and pay these taxes promptly as collected to the Police Board. Acts of 1868, Sections 27, 99, 30, App., p. 3, of 1869, Section 27, 28; Appendix, page 8, of 1874, Section 4, Rec., p. 16, of 1875, Appendix p. 20. The apportionments were to be followed by the levy of the taxes as the obligation imposed by the apportionments on the City, and this obligation and that of collecting and accounting for the police taxes collected, impresses the mind from the perusal of these statutes as the full significance and effect of the apportionments. There occurs, nowhere in these acts, the direction that the apportionments made and notified, the cities and parishes shall pay the amounts apportioned to the Police Board. There is no line of the acts that, by any natural implication manifests any such liability as within the legislative contemplation. If it had been the purpose to require the City without any reference

to the Police taxes directed to be levied, to pay in cash an estimate or apportionment for the Police expenses of the future year, for the apportionment was always in advance, i. e. at the beginning of the year, it is reasonable to suppose a liability so extraordinary in its character, would have found explicit declaration on the act. Dependent, as are all Municipal corporations upon taxes for all purposes of municipal governments the requisition of cash for estimated police expenses, and to be paid, whether or not the taxes provided to defray the police expenses were collected and in hand, would have been to require an imposibility. No such construction of these acts is warranted. The acts declare the apportionments "binding" on the cities and parishes. But surely, it would be straining language to hold, that because the apportionments were "binding," they were to be paid by the city as debts irrespective of the police taxes provided to pay these apportionments. The enactment, the apportionments made and notified shall be binding, is followed by the requirement that the police taxes shall be levied. The binding effect intended is thus illustrated by the act themselves, i. e. that the apportionments shall bind the cities and parishes to levy, collect, and pay over to the Board the police taxes. In one of these acts, that of 1870, the expression occurs, the cities and

parishes shall promptly pay or provide the means for payment of the apportionments, and a subsequent section is that unless the proportion of police expenses be paid *or* means provided for payment, that all other ordinances of the Council of New Orleans, and the Police juries of the parishes should be void. Act No. 94 of 1870, appendix, page 29 . To pay *or* provide the means was designed simply and only to enforce the levy of these taxes, for the means intended must be deemed to refer to the police taxes, the only means provided. In the Act No. 74 of 1874 careful provision is made to secure the levy of the police taxes up to the full amount of the apportionments, to be assessed and collected at the same time and in the same manner as other City taxes. Act, sections 2, 3, 4; appendix, p. 16. In the Act of 1875, it was enacted that one-twelfth of the annual taxes should be paid to the Board monthly, and if not, that the tax bills, should be turned over to the Board for collection, the Board itself as the beneficiary to be entitled to enforce the collections, and to this end the Board is subrogated to all the rights and remedies of the City for collecting its taxes. Act of 1875, Section 1, 2, 4, 5, et. seq., Appendix, page 19 specially. Appendix, page . The view that the City was liable for these estimates or apportionments never

occurred untill this bill was filed. In the previous litigation there was no such pretension. The suit in the State Court on behalf of these creditors claimed that the City was liable only for the Police taxes collected. The Court of course, decreed the distribution of the collections. Neither the demand or the decree announced any liability beyond these tax collections. Indeed, the decision by clear implication negatives any other liability. It was one of the questions in the case whether the City was liable for the Police tax judgments collected by a defaulting sheriff, never paid to the City. If the City was liable for the apportionments there was no room for the question. The Supreme Court of Louisiana, held the City was liable only for the Police taxes actually received. This decision if not technically res judicata, will doubtless be accepted by this Court as the true interpetation of the legislative acts. Harrisson, Receiver, vs. New Orleans, 40th La. Annual Reports, page 509. The review of the State legislation illustrated by the decision of the Supreme Court of the State, it is submitted shows it was not the legislative purpose to impose these estimates on the cities and parishes as debts, but only to require the levy of the taxes "up to the amount of the apportionments," and to exact the payment of the taxes collected

This view admits of additional support if any was needed. It is not usual to treat estimated expenses as debts. What were these apportionments but estimates. The Board convened as a board of estimate and apportionment, the act declares shall make a financial estimate of the sums required annually for the Police expenses. apportion the amounts to the cities and parishes, and each shall levy taxes up to the amount of the apportionment. These estimates were as the bill shows grossly excessive. Treating the estimates as debts the bill states that after crediting all payments from the taxes collected there remains the enormous sum of Nine hundred thousand dollars for which it is charged the City is liable. Bill, paragraph 7th, Record, page 7. The prayer is the City be decreed to pay such sum as is necessary to discharge the warrants and certificates. Notwithstanding the qualifications of the prayer, the result remains that on the theory of this bill, that the apportionments were debts, there is according to the bill the large balance of over $900,000 of liability. Yet the bill shows that the total liabilities unpaid of the Board are several hundred thousands of dollars less than the alleged balance due on the apportionments. The total extant debts proved before the Master was $129,000. If the City owed the amount of the apportionments,

the debt of the City exceeds by $800,000, all the liabilities to the creditors, to be provided for by the apportionments and the police taxes. If the amount of the apportionments could have been required there would have been exacted from the City, Eight hundred thousand dollars more than required for all the police expenses. In this view it is manifest, the estimates and apportionments were intended only to furnish the measure of the taxation to be imposed for the Police expenses. The bill converts the estimates into debts, and the asserted indebtedness is transformed into a fund. This fanciful fund is created to supply what is claimed to be the basis for a bill in Equity to distribute a fund. The fund, a bill would reach, would be the Police taxes collected. There is no such fund as the bill supposes, nor any liability of the City to contribute one dollar for the payment of these creditors beyond the Police taxes collected. Under these acts the creditors were entitled to the levy of the Police taxes, and if the City was at all remiss, the legal remedy to compel by mandamus the imposition of the taxes was ample. The further obligation of the City was to pay over the taxes collected. The legal remedy to compel that payment is ample. There is no other liability on the City, and none to contribute to an ideal fund having no existence in kind or by any fair construction of the Statutes.

Again, all must concede, that municipal governments are dependent for support on the taxes authorized to be levied for the corporate purposes. Usually too, there is a limit of municipal taxation, the necessity for which is enforced by experience. In Louisiana, during the period of the existence of this Metropolitan Police Board, that limit was one and three-fourths per cent., and one and one-fourth per cent. City Charter, Act No. 7 of 1870, Section 12th; Act No. 73 of 1872, Section 15th, Appendix, page 13. For one year only, 1872, this rate of taxation was enlarged to meet the shortage on the tax collections, and over receipt by the city of Metropolitan warrants. Act No 73 of 1872, Section 1, Appendix, p. 13. With this limited taxation for all purposes, the City had to provide for the support of public schools, lighting the city, keeping in repair the streets, extinguishing fires, payment of the salaries of the city officials, the interest on the bonded debt as well as for the police expenses. Previous to each fiscal year the City was required to make a budget of all these expenses for the year, and levy the taxes to raise the required amount. Act No. 73 of 1872, Section 14, 16, Appendix, page 14. The apportionments of the police expenses were as the bill states placed on the budget with the other items of expenditure. Bill, Paragraph 7th, Record, page 7. The pay-

ment of the police apportionments was to be from the Police taxes levied, along with the taxes for schools, lights, and the other municipal purposes. Without the collection of the taxes the school teachers could not be paid, or fires extinguished, or streets cleaned, or the bond creditors satisfied, or the police paid. Now, can anyone suggest any reason why an apportionment or appropriation on the budget for police expenses, stood upon any other footing with respect to payment, than the other apportionments on the budget for schools, fires, bonds, or other purposes. It was never hitherto, supposed that the City became the debtor for the school appropriation or the appropriation for fires. Why, then should the City be deemed the debtor as the bill contends, for the apportionments on the budget for the police? Every item in the budget was an appropriation dependent entirely on the collections of taxes. The significance of placing the police apportionment on the budget was no more different than the effect of putting other items in the budget, i. e. to indicate the probable amount to be raised by taxes for the budget purposes. Yet, if these police apportionments were debts, as this bill contends their payment could have been demanded as soon as the apportionments were made, or at any time. There was to be no pause according to the bill for

the collection of the police tax provided to pay the apportionments. It is evident, however, the City could pay only from its taxes. Was it to resort to the Metropolitan Police taxes to pay the apportionments as the answer insists, or is it to be contended that with nothing but taxes to pay any item upon the budget, the City on this theory of owing the amount of the police apportionment, was to turn over to the Police Board to pay the police, all the funds in hand, whether derived from the taxes for schools, fires or street cleaning or other specific purpose quite, as sacred and equally as important to the City government as its police. All understand that municipal taxes levied as they are for all items of expenditure on the budget, are to be applied to the specific purposes for which the taxes are raised, so that as the taxes are collected, the expenses under each heading or item on the budget are paid. Taxes collected for the schools are applied to the school expenses, the tax collected for the streets are applied to the streets expenses, and so on in respect to the application of all other taxes. If however, these apportionments for the police placed on the budget were debts to be paid without reference to the police taxes collected, then to pay the police, the City would have to abandon all other purposes of municipal government quite as important as the

police. The theory of the bill is a monopoly of all taxes for the police, until the huge apportionments were all paid. This, it is submitted, is not consistent with any orderly system of municipal or national government. Taxes collected for the police and no other fund was provided or applicable to pay the police. The holders of these warrants and certificates were dependent on the collection of the Police taxes just as creditors to be paid from other appropriations were dependent on the taxes levied for their appropriations. If the City could, on any theory, be deemed liable on the warrants and certificates left unpaid by the taxes, that liability is to be asserted at law. But it cannot be claimed there is any fund whatever to be realized by a bill in equity, save the taxes collected.

It follows, therefore, that the City, in this form of proceeding is liable to contribute to no ~~other~~ fund other than the taxes collected, and the fourth question must be answered in the negative.

Respectfully submitted,

HENRY C. MILLER,

E. A. O'SULLIVAN,

Solicitors for the City.

APPENDIX.

Acts of the Legislature and provisions of the Constitution of Louisiana as far as material to in the brief.

ACT No. 74 OF 1868, SESSION ACTS, PAGE 85.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana in General Assembly convened*, That the Parishes of Orleans, Jefferson and St. Bernard are hereby constituted and territorially united for the purposes of police government and police discipline therein, into one district which shall be known and called "The Metropolitan Police District of New Orleans, State of Louisiana."

SEC. 2. *Be it further enacted, etc.*, That the powers and duties connected with and incident to the police government and discipline of the said district shall be as hereinafter more especially provided for, vested in and exercised by a board, consisting of five commissioners, one to be a resident of the City of Jefferson, to be styled the Board of Metropolitan Police, and by a Metropolitan Police Force, composed of a Superintendent of Metropolitan Police force, Surgeons of Metropolitan Police force, Captains of Metropolitan Police force, Sergeants of Metropolitan Police force, Corporals of Metropolitan Police force, Patrolmen of Metropolitan Police force, Clerks and Doormen of Metropolitan Police force.

* * * * * * *

SEC. 8. *Be it further enacted, etc.*, That each officer and member of said Metropolitan Police force shall hold office respectively during good behavior, and shall be liable to removal from office or membership of the said police force only after written charges shall have been preferred against

him, according to the rules and regulations of the said Board of Commissioners; but no person shall ever be appointed to office or membership of the said police force who is not a citizen of the United States and of this State, or who ever has been convicted of crime, or who is disqualified by the fourteenth article of the Constitution of the United States, or by the terms of article ninety-nine of the Constitution of this State.

* * * * * * *

SEC. 27. *Be it further enacted, etc.*, That the Board of Commissioners, convened as a board of estimate and apportionment, shall, on the first Monday after their appointment and annually thereafter, proceed to make up a financial estimate of the sums required *annually* for expenses in the execution of criminal process, supplying for the fitting up, lighting, cleansing, repairing, furnishing of police offices and stations, lockups, houses of detention, for alterations in, addition to and repairs of same, for office fixtures and accommodation, advertising, printing and stationery, police badges, numbers and clubs, beds and bedding for the police force, and for witnesses and prisoners, for support of witnesses and prisoners while in the custody of the police, for secret police service, hack and cab hire, and also for all sums necessary for counsel fees, law expenses and disbursements by the Board of Commissioners, or rendered necessary in criminal or civil actions and proceedings against the said commissioners or officers or members of the force for acts done in the discharge of duty or by color of office, and also for the salaries and pay required by this act, and such other general and contingent expenses as may from time to time, in the judgment of such board of estimate and apportionment, become necessary or proper, with the enumeration thereof. Such estimate shall be accompanied with a written apportionment by said Board,

of the proportion of expenses applicable to each of the cities and parishes in the Metropolitan District, in ratio of the number of police officers and men authorized by this act and employed by such cities and parishes respectively, The said estimate and apportionment shall be submitted to the mayors of the cities and police juries of the parishes within the said Metropolitan District to consider the same, and if the said mayors or police juries shall object in writing to such estimate and apportionment, or to any portion thereof, and so notify or cause to be notified the said Board of Commissioners, it shall be the duty of the latter to carefully revise the same and consider the said objection; but if such board shall adhere to their original action of estimate and apportionment, or if they shall modify the same, then their action shall be final, and shall be binding upon the respective cities and towns interested therein.

* * * * * * *

SEC. 29. *Be it further enacted, etc.*, That the Common Councils of the Cities of New Orleans, Jefferson City and Carrollton, and the police juries of the towns of Algiers and Gretna, and of the parishes of Orleans, Jefferson and St Bernard are hereby respectively empowered and directed annually to order and cause to be raised and collected by the tax upon the estates, real and personal, subject to taxation according to law, within the said cities and towns, the sums of money as aforesaid, annually estimated and apportioned as the share of such cities or parishes of the said total expenses of the Metropolitan Police District.

SEC. 30. *Be it further enacted, etc.*, That the State Treasurer shall receive the sums estimated and apportioned to the said cities and parishes of the Metropolitan District from or through the treasurers of said cities and parishes respectively, and give proper receipts for such sums as he may receive.

All moneys paid out of the Metropolitan Police fund shall be so paid out on a warrant signed by the President and any two other members of the board, attested by the chief clerk.

* * * * * * *

SEC. 50. *Be it further enacted, etc.*, That the salaries and compensation of Police Commissioners and other officers and employes of the Board of Metropolitan Police shall, from the time of their appointment, be as follows:

President of the Board, two thousand five hundred dollars ($2500).

Treasurer of the Board, two thousand five hundred dollars ($2500).

Other Commissioners, each two thousand dollars ($2000).

Superintendent, three thousand dollars ($3000).

Chief Clerk, two thousand dollars ($2000).

Deputy Clerk, one thousand six hundred dollars ($1600).

Property Clerk, one thousand two hundred dollars ($1200).

Other Clerks, one thousand two hundred dollars ($1200).

Police Surgeons, one thousand six hundred dollars ($1600).

Captains, one thousand eight hundred dollars ($1800).

Sergeants, one thousand five hundred dollars ($1500).

Corporals, one thousand one hundred dollars ($1100).

Detectives, one thousand four hundred dollars ($1400).

Patrolmen, one thousand dollars ($1000).

Doormen, eight hundred dollars ($800).

The salaries and pay aforesaid shall be paid monthly to each person entitled thereto, in modes to be prescribed by the rules and regulations, subject to such deductions each month from the salaries or pay of each member of the Metropolitan Police force as the Treasurer shall make (and which deduction he is hereby authorized to retain) to satisfy fines imposed on any member of the Metropolitan Police force by way of discipline or punishment, as prescribed by the rules and

regulations of the Board. The salaries of the Commissioners shall be paid by the Treasurer of State out of the Metropolitan police fund.

* * * * * * *

SEC. 54. *Be it further enacted, etc.*, That the salaries and compensations of the said police telegraph corps shall be as follows:

To a Superintendent of Fire Alarm and Police Telegraph, two thousand five hundred dollars ($2500) per annum.

To the Assistant Superintendent of Fire Alarm and Police Telegraph, one thousand eight hundred dollars ($1800) per annum.

To the Operators, one thousand four hundred ($1400) per annum.

Linemen, one thousand eight hundred dollars ($1800) per annum.

Batteryman, eight hundred dollars ($800) per annum.

The salaries and pay aforesaid shall be paid monthly, to each person entitled thereto, in modes to be prescribed by the rules and regulations of the Board, subject to such deduction for neglect of duty, violation of rules and regulations, etc., as may be adjudged and prescribed by the Board.

SEC. 55. *Be it further enacted, etc.*, That there shall be appointed by the Board of Police Commissioners two surgeons, who shall perform the duty now performed by the city physicians and such other duties as the Commissioners may from time to time prescribe. The police surgeons shall also act as experts for the Coroners, making *post mortem* examinations whenever called upon by the Coroners of the districts. The salary of these surgeons shall be two thousand five hundred dollars ($2500) per annum.

ACT No. 92 OF 1869, SESSION ACTS, PAGE 92.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana in General Assembly convened*, That the act entitled "An Act to establish a Metropolitan Police District and to provide for the government thereof," is hereby amended and re-enacted so as to read as follows:

SEC. 2. *Be it further enacted, etc.*, That the parishes of Orleans, Jefferson and St. Bernard, are hereby constituted and territorially united for the purposes of police government and police discipline therein, into one district, which shall be known and called "The Metropolitan Police District of New Orleans, State of Louisiana."

SEC. 3. *Be it further enacted, etc.*, That the powers and duties connected with and incident to the police government and discipline of the said district, shall be as hereinafter more especially provided for, vested in and exercised by a board consisting of five commissioners, one to be a resident of the City of Jefferson, to be styled the "Board of Metropolitan Police," and by a Metropolitan Police force composed of a superintendent of Metropolitan Police, surgeons of Metropolitan Police force, captains of Metropolitan Police force, sergeants of Metropolitan Police force, corporals of Metropolitan Police force, patrolmen of Metropolitan Police force, clerks and doormen of Metropolitan Police force.

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SEC. 9. *Be it further enacted, etc.*, That each officer and member of said Metropolitan Police force shall hold office respectively during good behavior, and shall be liable to removal from office or membership of the said police force only after written charges shall have been preferred against him, according to the rules and regulations of the said board of commissioners; but no person shall ever be appointed to office

or membership of the said police force who is not a citizen of the United States and of this State, or whoever has been convicted of crime, or who is disqualified by the fourteenth article of the Constitution of the United States, or by the terms of article ninety-nine of the constitution of this State.

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SEC. 25. *Be it further enacted, etc.*, That the Board of Commissioners, convened as a Board of Estimate and Apportionment, shall on the first Monday after their appointment, and annually thereafter, proceed to make up a financial estimate of the sums required annually for expenses in the execution of criminal process, supplying for the fitting up, lighting, cleansing, repairing, furnishing of police offices and stations, lock-ups, houses of detention, for attendance, in additions to and repairs of same, for office fixtures and accommodations, advertising, printing and stationery, police badges, numbers and clubs, beds and bedding for the police force, and for witnessess and prisioners, for support of witnesses and prisoners while in the custody of the police, for secret police service, hack and cab hire, and also for all sums necessary for counsel fees, law expenses and disbursements of the Board of Commissioners, or rendered necessary in criminal or civil actions and proceedings against the said commissioners or officers or members of the force for acts done in the discharge of duty, or by color of office, and also for the salaries and pay required by this act, and such other general and contingent expenses as may from time to time, in the judgment of such Board of Estimate and Apportionment, become necessary or proper with the enumeration thereof. Such estimate shall be accompanied with a written apportionment by said board of the proportion of expenses applicable to each of the cities and parishes in the Metropolitan District, in ratio of the number of police officers and men assigned by said Metropolitan

Police Board for police duty in said cities or parishes within the Metropolitan Police District. The said estimate and apportionment shall be submitted to the Mayor of the cities, and police juries of the parishes within the said Metropolitan District to consider the same, and if the said Mayors or police juries shall object in writing to such estimate and apportionment, or to any portion thereof, and so notify or cause to be notified the said Board of Commissioners, it shall be the duty of the latter to carefully revise the same and consider the said objections; but if such board shall adhere to their original action of estimate and apportionment, or if they shall modify the same, then their action shall be final and shall be binding upon the respective cities and parishes within the Metropolitan District interested therein.

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SEC. 27. *Be it further enacted, etc.*, That the Common Councils of the cities of New Orleans, Jefferson and Carrollton, and the police juries of the towns of Algiers and Gretna, and of the parishes of Orleans, Jefferson and St. Bernard, are hereby respectively empowered and directed annually to order and cause to be raised and collected by the tax upon the estate, real and personal, subject to taxation according to law, within the said cities and parishes, the sums of money as aforesaid annually estimated and apportioned as the share of such city or parishes of said total expenses of the Metropolitan Police District.

SEC 28. *Be it further enacted, etc.*, That the State Treasurer shall receive the sums estimated and apportioned to the said cities and parishes of the Metropolitan District from or through the treasurers of said cities and parishes, respectively, and give proper receipts for such sums as he may receive. All moneys paid out of the Metropolitan Police fund shall be so paid out on a warrant signed by the President and any two other members of the board, attested by the chief clerk.

ACT No. 44 OF 1869, SESSION ACTS 42.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana in General Assembly convened,* That all warrants issued in payment of the salaries of officers, employes and members of the Metropolitan Police in accordance with Act No. 74, (seventy-four) approved September 14, (fourteen) 1868, (one thousand eight hundred and sixty-eight) and entitled "An act to establish a Metropolitan Police District, and to provide for the government thereof," be and they are hereby made receivable for all parish and municipal licenses and taxes within the limits of the Metropolitan Police District, to-wit: The parishes of Orleans, Jefferson and St. Bernard, and the cities of New Orleans, Jefferson and Carrollton; *provided,* that the aggregate of said warrants so received in each current year, shall not exceed the amount of the apportionment made by the Board of Metropolitan Police Commissionees, upon such city or parish for that year.

SEC. 2. *Be it further enacted, etc.,* That it shall be the duty of the said board to publish for one week in each year, in one daily newspaper in the city of New Orleans, a statement of the apportionments for the year, against each city and parish within said district.

SEC. 3. *Be it further enacted, etc.,* That any parish or municipal officer who shall refuse to receive such warrants for taxes as above provided, shall be liable on his official bond to the party or parties offering them in all actual damages sustained by such party or parties, and in exemplary damages for at least double the amount of the taxes so refused to be received.

SEC. 4. *Be it further enacted, etc*, That all laws and ordinances, and all parts of laws and ordinances contrary to or in conflict with the provisions of this act be and the same

are hereby repealed, and that this act shall take effect from and after its passage.

(Signed) CHAS. W. LOWELL,
Speaker of the House of Representatives.

(Signed) OSCAR J. DUNN,
Lieutenant Governor and President of the Senate.

Approved February 27, 1869.

(Signed) H. C. WARMOTH,
Governor of the State of Louisiana.

A true copy:
GEO. E. BOVEE, Secretary of State.

ACT No. 41 OF 1870, REGULAR SESSION ACTS, PAGE 74.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana in General Assembly convened,* That all warrants, checks or orders issued or to be hereafter issued, signed by the chief clerk on the treasurer, and approved by the president, in payment of the salaries of the officers, employes and members of the Metropolitan Police District of New Orleans, State of Louisiana, and all warrants, checks, or orders issued, or that may hereafter be issued, signed and approved as aforesaid, for the supplies and expenses of said board of said police, shall be and they are hereby made receivable for ail parish (*es*) and municipal licenses and taxes and debts due or to become due to the parishes of Orleans, Jefferson and St. Bernard, and the cities of New Orleans, Jefferson and Carrollton; *provided,* that the aggregate of said warrants, checks or orders so received in each current year shall not exceed the amount of the apportionment made by the Board of Metropolitan Police Commissioners upon said parishes or cities for that year.

SEC. 2. *Be it further enacted, etc.,* That any treasurer

or other officer of either of the aforesaid parishes or cities who shall refuse to receive such warrants, checks or orders in payment of licenses, taxes and dues to such parish or city when tendered to him in payment thereof, shall, with the securities on his official bond, be liable *in solido*, for, and may be condemned in any court of competent jurisdiction to pay to any holder of such warrant, check or order, the full amount of such warrant, check or order, with eight per cent. interest from the time of said tender, and shall cease to be such treasurer or officer of such parish or city, and the Governor shall appoint his successor to serve out the balance of such treasurer or other officer's term of office on being made aware of said refusal, the evidence of which shall be the production to the Governor of the protest made by any notary public, in due form, of any such warrant, check or order having been tendered and refused as aforesaid.

SEC. 3. *Be it further enacted, etc.*, That the Treasurer of the State of Louisiana shall receive from the parish and city treasurer of the aforesaid parishes and cities all such warrants, checks or orders, so as aforesaid issued by the said Board of Metropolitan Police Commissioners, and receipt for the same as cash received from such parishes and cities in payment of the proportions of the apportionment assessed on them by said board.

SEC. 4. *Be it further enacted, etc.*, That this act shall take effect from and after its passage.

(Signed) MORTIMER CARR,
Speaker of the House of Representatives.
(Signed) OSCAR J. DUNN,
Lieutenant Governor and President of the Senate.
Approved February 20th, 1870,
(Signed) H. C. WARMOTH,
Governor of the State of Louisiana.

A true copy:
GEO. E. BOVEE, Secretary of State.

Extract from amended city charter of March 16th, 1870, conferring and limiting the taxing power.

ACT No. 7 OF 1870, SESSION ACTS PAGE 30.

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SEC. 2. *Be it further enacted, etc.*, That all that portion of the parish of Orleans situated on the left bank of the Mississippi river, and all that portion of the parish of Orleans situated on the right bank of the Mississippi river shall constitute the parish of Orleans and the city of New Orleans, and that all the inhabitants thereof shall be a body corporate, to be known by the name of the city of New Orleans, and by that name they and their successors shall be known in law, and shall be capable of suing and being sued, and of prosecuting and defending in all courts and in all actions and matters whatsoever; and shall have a common seal, and may alter and change the same at pleasure, and by the same name they shall be capable of holding and conveying any estate, real and personal, for the use of said corporation, under the restrictions and limitations hereinafter set forth; and upon the first organization of the Council, as herein provided, shall be vested with all powers, rights, privileges and immunities incident to a municipal corporation, and necessary for the proper government of the same.

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SEC. 12. *Be it further enacted, etc.*, That the Council shall have full power and authority to make and pass such by-laws and ordinances as are necessary and proper.

First—To regulate and preserve the peace and good order of the city, and provide for and maintain its cleanliness and salubrity, not inconsistent with any law relative thereto.

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Twentieth—To levy an equal and uniform tax for the purposes of this act, upon all property, real and personal, in

said city, under assessments thereof, to be made in the manner said Council shall prescribe, and to provide for its collection; but said tax, added to the consolidated loan tax and to the special tax, for the payment of the annual interest on the bonds issued by the city for subscription to the stocks of the New Orleans, Opelousas and Great Western Railroad Company, the New Orleans, Jackson and Great Northern Railroad Company, and the Pontchartrain Railroad Company, and the interest on the ten per cent. bonds, and the interest on seven per cent. bonds issued by the city of New Orleans, shall not, in the aggregate, be more than one dollar and seventy-five cents on the one hundred dollars of valuation annually, except in case of invasion or insurrection, provided it be sufficient to pay the interest on the consolidated debt and railroad bonds issued by the city of New Orleans; and also for the purposes of this act, to levy, impose and collect a license tax upon all persons pursuing any trade, profession or calling, and to provide for its collection; and said license tax shall not be construed to be a tax on property.

ACT No. 73 OF 1872, SESSION ACTS PAGE 124, 127.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana in General Assembly convened*, That the Council of the city of New Orleans be and is hereby authorized and empowered to levy and assess a police tax, additional to all taxes levied in the month of December, 1871, for the purpose of defraying the police expenses of the year ending September 30, 1872, and any deficiencies in the revenues of the city arising from the over receipt of police warrants for city taxes.

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SEC. 14. *Be it further enacted, etc*, That within the months of November and December, 1872, and annually,

thereafter, the Council shall adopt estimates of receipts and expenditures (the latter including police and excluding schools) for the ensuing year. The estimate of expenditures shall not be finally adopted until one week shall have elapsed after final adoption of the estimate of revenues, and it shall not exceed the same.

SEC. 15. *Be it further enacted, etc.*, That the Council, after the adoption of the estimate, shall proceed to levy the annual taxes required, to-wit:

First—The city debt tax, which shall be based upon the detailed estimate of the sinking funds and interest falling due. For all bonds for which no other retiring provision exists by law, an estimate shall be included of not less than two nor more than ten per cent. of the face of the bonds outstanding of any of the several issues, which shall be applied to the retiring of bonds offered at the most advantageous rates, no bid to be accepted higher than par, and the right reserved to reject all bids. No limit other than herein laid down shall apply to this tax, which is hereby declared a vested right of the bondholders interested.

Second—A tax for current city expenses, including police and exclusive of interest and schools. This tax shall in no year exceed one and a quarter per cent. upon the assessed value of real, personal and mixed property.

These taxes shall bear the name of the year in which they shall be collectable, and the assessment upon which they shall be made shall be termed the assessments for the said year.

ACT 33 OF 1874, SESSION ACTS PAGE 68.

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SEC. 2. *Be it further enacted, etc.*, That section twenty-seven of an act of the General Assembly of the State of Louisiana, entitled an act to amend and re-enact an act entitled an act to establish a Metropolitan Police District, and to

provide for the government thereof, approved September 14, 1868, approved March 8, 1869, and which reads as follows: "That the common councils of the cities of New Orleans, Jefferson and Carrollton, and the police juries of the towns of Algiers and Gretna, and of the parishes of Orleans, Jefferson and St. Bernard, are hereby respectively empowered and directed annually to order and cause to be raised and collected by the tax upon the estate, real and personal, subject to taxation according to law within the said cities and parishes the sums of money as aforesaid annually estimated and apportioned as the share of such city or parishes of said total expenses of the Metropolitan Police District," be amended and re-enacted to read as follows: The common councils of the cities of New Orleans and Carrollton, and the towns of Kennerville, and the police jury of the parishes of Jefferson and St. Bernard are respectively authorized and required, and hereby directed to levy and collect a special tax upon all property, real and personal, subject by law to taxation, within the cities of New Orleans and Carrollton, the town of Kennerville and the parishes of Jefferson and St. Bernard, as estimated and apportioned by the Board of Mstropolitan Police Commissioners for the sums due by each of the said cities, town and parishes composing the said Metropolitan Police District, for the support and maintenance of the Metrepolitan Police force for the year in which said estimate and apportionment is made and furnished by said Board of Police Commissioners to said cities, town and parishes composing the Metropolitan Police District to the full amount of the estimate and apportionment so made and furnished, and the common councils of the cities of New Orleans and Carrollton, the town of Kennerville and the police juries of the parishes of Jefferson and St. Bernard shall cause the tax for police purposes to be assessed and collected at the

same time and in the same manner as provided by law for the collection of other taxes due the said cities, town and parishes and any failure or refusal on the part of the common councils and police juries of the cities, town and parishes composing the said Metropolitan Police District to comply with the provisions of this law or discrimination in collection against this tax and in favor of any other tax or taxes, to the detriment of this tax, shall be cause for removal from office of such parties so offending by the Governor of the State. If any municipal or parish officer within the said Metropolitan Police District shall mingle any portion of the moneys collected on account of the Metropolitan Police tax with any other funds, or shall divert the same from the purposes contemplated by this law, he shall be removed from office by the Governor of the State, and liable to criminal indictment for malfeasance in office.

SEC. 3. *Be it further enacted, etc.*, That the fiscal year of the Board of Metropolitan Police shall begin with the first day of January, and end with the last day of December in each year, and that the Board of Police Commissioners shall make an estimate and apportionment for the expenses of the Metropolitan Police District for the year commencing January 1, 1874, and thereafter on or before the first day of January of each year, which estimate and apportionment shall be binding upon the cities of New Orleans and Carrollton, and the town of Kennerville, and the parishes of Jefferson and St. Bernard, in accordance with the terms of existing laws, and of this act, with regard to the estimates and apportionments of the annual expenses for the support and maintenance of the Metropolitan Police force, authorized to be made by said Board of Police Commissioners.

SEC. 4. *Be it further enacted, etc*, That the Board of Metropolitan Police Commissioners be and they are hereby empowered and directed to elect annually, on the first Monday

of January in each year, or whenever a vacancy shall occur, and for the year 1874, immediately after the passage of this act, a fiscal agent for the Board of Metropolitan Police. He shall execute a bond with sureties, not less than two, conditioned in a penalty of sixty thousand dollars for the faithful discharge of his duties as fiscal agent, and the said bond shall be approved by the Board of Police Commissioners and filed with the recorder of mortgages before he shall enter upon the discharge of his duties. He shall receive from the treasurers of the cities of New Orleans and Carrollton, and the town of Kennerville and the parishes of St. Bernard and Jefferson, all moneys arising from the tax levied and collected for the support and maintenance of the Metropolitan Police, as estimated and apportioned by the said Board of Police Commissioners against the several cities, town and parishes composing the said Metropolitan Police District; that the Administrator of Finance of the city of New Orleans and the treasurer of the city of Carrollton, the town of Kennerville and the parishes of St. Bernard and Jefferson, shall on Saturday of each week make settlement with and pay over to the said fiscal agent of the Board of Metropolitan Police the moneys collected by the said Administrator or treasurers on account of Metropolitan Police tax, taking proper receipts therefor from the said fiscal agent; that such settlement shall be made upon sworn statements by said Administrator and treasurers of the sums so collected and turned over by them in each weekly settlement; that in the collection of the tax levied for Metropolitan Police purposes, payment shall be made and received in lawful money of the United States only, and it shall be unlawful to receive in payment of said tax any warrants or evidence of indebtedness of any kind whatever; *provided*, that Metropolitan Police warrants, issued by the Board of Police Commissioners for the payment of salaries and expenses of the police department, incurred prior to

January 1, 1874, shall be receivable in full for all taxes due the cities of New Orleans and Carrollton, the town of Kennerville and the parishes of Jefferson and St. Bernard for the years prior to January 1, 1874, except tax for interest on the bonded debt, the public school tax and city park tax, and for all licenses and debts other than taxes due the said cities, town and parishes composing the Metropolitan Police district, due or to become due as provided by existing laws, until the said outstanding Metropolitan Police warrants shall all be absorbed, and that the warrants so received shall be credited to the several cities, town and parishes composing the Metropolitan District pro rata against the apportionments made by the Board of Police Commissioners for the fiscal years prior and up to January 1, 1874, after which they shall be turned over to the treasurer of the Board of Police Commissioners to be by him canceled and destroyed under supervision of said board.

SEC. 5. *Be it further enacted, etc.*, That it shall be the duty of the fiscal agent to report to the Board of Metropolitan Police in writing, on or before the twenty-fifth day of each month, all amounts received by him from the corporations composing the Metropolitan Police District, and all amounts paid by him to the treasurer of the board. Such report shall show the amounts received from each corporation and the dates said amounts were received, and such report shall also show the nature and details of all transactions made by him in his capacity of fiscal agent of the Board of Metropolitan Police. The compensation to be allowed the said fiscal agent shall be fixed by the Board of Police Commissioners.

SEC. 6. *Be it further enacted, etc*, That the Board of Police Commissioners shall, on or before the fifth day of each month, furnish the fiscal agent an estimate of the amount required to pay the salaries and expenses of the police depart-

ment for the previous month, on which estimate and order, signed by the president or vice-president of the Board of Police Commissioners, attested by the chief or deputy clerk, the fiscal agent shall turn over to the treasurer of the said board the amount required to pay the salaries and expenses of the police department for the previous month, for which the said fiscal agent shall require the official receipt of said treasurer; *provided*, that in no case at any one time shall an order be drawn upon the said fiscal agent for a sum exceeding two-thirds of the amount of the official bond furnished by the said treasurer; *and provided further*, that no order shall be drawn upon said fiscal agent unless there be funds in his hands to meet the same.

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SEC. 9. *Be it further enacted, etc*, That the sheriffs of the parishes of Orleans, Jefferson and St. Bernard are authorized and they are hereby directed to receive Metropolitan Police warrants issued by the Board of Police Commissioners for the payment of salaries and other expenses of the Metropolitan Police Department, incurred prior to the first day of January, 1874, in full payment for the face value of taxes due to the cities of New Orleans and Carrollton and the parishes of Jefferson and St. Bernard, except tax for interest on the bonded debt, the public school tax and the city park tax, including penalties and interest arising from the non-payment thereof, and any neglect or refusal on the part of the said sheriffs to receive Metrepolitan Police warrants when tendered as provided in this act shall be cause for their removal from such office by the Governor of the State.

ACT No. 16 OF 1875.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana in General Assembly convened;* That the total amount of the apportionment made

by the Board of Metropolitan Police for any year, against each and every parish and city belonging to and constituting part of the Metropolitan Police District, shall be divided into twelve equal parts, one for each month of the current year, one of which parts shall be payable and collectible in full on or before the last day of each month as the pro rata of such apportionment for that month.

SEC. 2. *Be it further enacted, etc.*, That it is hereby made the duty of the city of New Orleans, and of each and every city and parish constituting and making part of the Metropolitan Police District to pay to the treasurer of the Board of Metropolitan Police on or before the end of every month the full amount of the pro rata of the apportionment made against such parish or city for the current year by said board that is payable and collectible for said month, *provided*, that any excess of money over such pro rata that may have been collected shall also be paid to the said board.

SEC. 3. *Be it further enacted, etc.*, That whenever the city of New Orleans, or any parish or city constituting or making part of the Metropolitan Police District, shall refuse, neglect, or be unable to collect the tax by them or either of them levied to pay the apportionment made upon them or either of them by the Board of Metropolitan Police, so as to pay the full amount of the pro rata due for any month, on or before the last day of such month, as required by sections one and two of this act, then, and in that case the Board of Metropolitan Police shall have authority to negotiate for and borrow such a sum of money as in the opinion of said board shall be sufficient to pay the expenses of the Metropolitan Police for such time as the said board shall deem necessary, such loan not to exceed in amount the apportionment made by said board in accordance with law. And to this end the said Board of Metropolitan Police shall have power to hypo-

thecate and pledge to any person or persons, corporation or corporations, as security for such loan, the whole, or any part of the tax levied by such parish or city for the purpose of paying the apportionment made against such parish or city by the Board of Metropolitan Police for that year.

SEC. 4. *Be it further enacted, etc*, That whenever the city of New Orleans, or any parish or city constituting or making part of the Metropolitan Police District, shall fail to pay the full amount of the pro rata of the apportionment against such parish or city for any month on or before the last day of the month for which such pro rata shall be payable and collectible, it shall be the duty of the Administrator of Finance of the city of New Orleans, or of the treasurer of such other city or parish, upon the demand of the president of the Board of Metropolitan Police, to forthwith transfer to said Board of Metropolitan Police all tax bills for the tax levied to meet the apportionment of the Board of Metropolitan Police for that year still remaining due and unpaid to such city or parish. Such Administrator of Finance or treasurer shall also forthwith make out and render to the Board of Metropolitan Police a full and complete statement of the gross amount of the tax levied for that year for police purposes by such city or parish; also a statement of the total amount of said tax that has been paid to or collected by said parish or city up to the date of such demand, and also a statement of the rate of per centum on the dollar of the tax so levied, and also a full and accurate and complete list of the names of all taxpayers of such city or parish, which list shall contain, in suitable columns opposite each name, the amount of property assessed to each taxpayer on the assessment roll of such city or parish, the amount of the tax for police purposes levied on such assessment against each taxpayer, and whether such tax is paid or unpaid, which list shall be signed

and sworn to as correct and true by said Administrator of Finance or treasurer, as the case may be.

SEC. 5. *Be it further enacted, etc.*, That immediately upon such failure and default in such payment by any such city or parish, and upon such demand made by the Board of Metropolitan Police the said board shall cause public notice thereof to be given. by publication in all the principal newspapers of such city or parish for six consecutive days, in a daily newspaper, or for two consecutive weeks; if in a weekly newspaper; such notice shall recite such failure and default in payment, and notify all persons owing such tax to pay the same to the treasurer of the Board of Metropolitan Police, and to no other person.

SEC. 6. *Be it further enacted, etc.*, That from and after any default in payment of any monthly pro rata and demand made by the Board of Metropolitan Police, and publication of notice as hereinbefore provided it shall be unlawful for any official, of any city or parish constituting or making part of the Metropolitan District, to make or attempt to make any collection of said tax levied for police purposes. Any official of such city or parish who shall violate the provisions of this section shall be liable in damages to the Board of Metropolitan Police, or to any person who shall be interested in such tax as the security for any loan or loans negotiated or made as hereinbefore provided, and the sureties upon his official bond shall be liable jointly with such official; and in addition to such damages, any official so offending shall be deemed guilty of a misdemeanor in office, and upon conviction thereof shall be punished by a fine of not less than five hundred dollars, and by imprisonment for not loss than thirty days, or both, at the discretion of the court.

SEC. 7. *Be it further enacted, etc.*, That immediately upon the transfer by the Board of Metropolitan Police of the

tax bills and tax lists as hereinbefore provided, all the taxes levied for police purposes by such city or parish, and still remaining due and unpaid, shall be payable to the Board of Metropolitan Police, and said Board shall have power to collect and receive the said taxes and receipt therefor in a similar manner and by similar processes, and with similar penalties as are by law provided for the collection of city taxes, except as herein otherwise provided. The attorney of the Board of Metropolitan Police shall prosecute all suits brought in the name of the said board for the collection of taxes, or in which the validity or collection of any apportionment is brought into question, and shall receive three per centum upon all moneys collected by such suits or legal proceedings on behalf of the board.

SEC. 8. *Be it further enacted, etc.*, That if the Administrator of Finance of the city of New Orleans, or the treasurer of any other each city or parish, shall refuse or neglect to transfer any tax bills or tax lists as above provided, such Administrator of Finance or treasurer shall be deemed guilty of a misdemeanor in office, and upon conviction thereof shall be punished by a fine of not less than five hundred dollars and by imprisonment for not less than thirty days, or both, at the discretion of the court, and in addition thereto such official shall be liable in a civil suit for damages to the Board of Metropolitan Police, or to any person or persons interested in any loan or loans negotiated or made as hereinbefore provided who shall suffer damage thereby.

SEC. 9. *Be it further enacted, etc.*, That all taxes collected by the city of New Orleans, or by any city or parish of the Metropolitan Police District, for police puposes for the year 1875, shall be paid by such city or parish to the treasurer of the Board of Metropolitan Police, and to no other person.

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SEC. 11. *Be it further enacted, etc.*, That the Administrator of Finance of the city of New Orleans, and the treasurer of each city or parish of the Metropolitan Police District, shall on or before 12 M. on the Saturday of each week, pay over to the treasurer of the Board of Metropolitan Police all sums collected by him during that week, for or on account of the tax levied for police purposes, and nothing in section one of this act shall be so construed as to conflict with the provisions of this section.

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SEC. 18. *Be it further enacted, etc.*, That all that remain of the tax levied by the city of New Orleans and each and every other city and parish of the Motropolitan District for police purposes, that shall remain delinquent and unpaid after the lien of the fiscal agent of said board for that year on the same for loans made, shall have been satisfied and discharged, shall be paid by the said cities and parishes to the State treasury, to reimburse the advance made by the State to the Board of Metropolitan Police by this act.

ACT No. 35 OF 1877, SESSION ACTS, PAGE 57.

To repeal Act No. 74, approved September fourteenth, eighteen hundred and sixty eight; Act No. 44, approved February twenty-seventh, eighteen hundred and sixty-nine: Act No. 87, approved March sixth, eighteen hundred and sixty-nine; Act No. 92, approved March eighth, eighteen hundred and sixty-nine; Act No. 94, approved March thirtieth, eighteen hundred and seventy; Act No. 37, approved March fifth, eighteen hundred and seventy-three; Act No. 64, approved March twenty-sixth, eighteen hundred and seventy-three; Act No. 33, approved February twenty-sixth, eighteen hundred and seventy-four; Act No. 60, approved March seventeenth, eighteen hundred and seventy four; Act No. 16, approved March twenty-fourth, eighteen hundred and seventy-five; and to authorize the city of New Orleans to establish, organize and maintain a proper and sufficient police force, to preserve order and good government within the corporate limits of said city, and to assume control of the fire alarm and police telegraph, and to pass ordinances providing for the control, direction and pay of the said police force, and to limit the annual expense of the same, and to establish a Board of Police Commissioners.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana in General Assembly convened*, That Act No 74, approved September fourteenth,

eighteen hundred and sixty-eight, entitled "An Act to establish a Metroplitan Police District and to provide for the government thereof," Act No. 44, approved February twenty-seventh, eighteen hundred and sixty-nine; Act No. 87, approved March sixth, eighteen hundred and sixty-nine; Act No. 92, approved March eight, eighteen hundred and sixty-nine, entitled "An Act to amend and re-enact 'an Act to establish a Metropolitan Police District and to provide for the government thereof,'" approved September fourteenth, eighteen hundred and sixty-eight; Act No. 94, approved March thirtieth, eighteen hundred and seventy, entitled "An Act to order the payment and to provide the means for the payment of the estimate and apportionment of the expenses of the Board of Metropolitan Police, assessed and applicable to the cities, parishes and police juries within the Metropolitan Police Districts, and to more fully define the duties of the State Treasurer;" Act No. 37, approved March fifth, eighteen hundred and seventy-three, entitled "An Act authorizing the muster of the Metropolitan Police force as a part of the militia of the State, authorizing the said force to be increased when on militia duty to three full regiments, to be called the Metropolitan Brigade; authorizing the assignment of other officers and troops to said brigage, and providing for the enlistment, enrollment, pay and command of said Metropolitan Brigade;" Act No. 64, approved March twenty sixth, eighteen hundred and seventy-three; Act 33, approved February twenty-sixth, eighteen hundred and seventy four, entitled "An Act to amend and re-enact sections fifteen and twenty-seven of an Act of the General Assembly of the State of Louisiana, entitled an Act to amend and re-enact an Act entitled an Act to establish a Metropolitan Police District, and to provide for the government thereof, approved September fourteenth, eighteen hundred and sixty-eight, approved

March eight, eighteen hundred and sixty-nine," and for other purposes; Act No. 60, approved March seventeenth, eighteen hundred and seventy-four, and Act No. 16, approved March twenty fourth, eighteen hundred and seventy-five, entitled "An Act to enforce the payment by the city of New Orleans and the several cities and parishes of the Metropolitan Police District, of the apportionment made upon them by the Board of Metropolitan Police and for other purposes," be and the same are hereby repealed; the said repeal to take effect from and after the passage of this Act.

SEC. 2. *Be it further enacted, etc.*, That the city of New Ooleans be and it is hereby authorized and empowered, through the Mayor and Board of Administrators, to establish organize and maintain a proper and sufficient police force, to preserve order and good government within the corporate limits of said city, and to assume the management and control of the fire alarm and police telegraph; *provided*, the whole expense of said police force, fire alarm and police telegraph shall not exceed, and is hereby limited to the sum of three hundred and twenty-five thousand dollars per annum.

SEC. 3. *Be it further enacted, etc*, That said police force and fire alarm and police telegraph shall be entirely under the control and direction of the Mayor and Board of Administrators of the city of New Orleans, so far as the appointment and organization of the same is concerned, and that the said City Council shall provide therefor, by the passage of suitable ordinances, and shall also provide in said ordinances for the appointment of a Board of Police Commissioners; said board shall consits of four commissioners, in addition to the Mayor of the city of New Orleans, who shall be *ex-officio* a member and president of the boord, and the Administrator of Police of said city, who shall be *ex-officio* a member of said board to be chosen in the manner hereinafter prescribed, and a majority of said board shall constitute a quorum for the

transaction of business That the Mayor shall nominate, and with the advice and consent of the Common Council, appoint the commissioners of said Board of Police; and the said commissioners shall hold office for one, two, three and four years, to be determined by lot; upon their appointment, and at the expiration of the term of each of said commissioners, the Mayor shall appoint as aforesaid, a commissioner, who shall hold office for four years. The power of trying, of removal or of suspension of any of the officers or patrolmen is exclusively vested in said board, and it shall possess such other powers and perform such other duties as may be authorized and enjoined by the city administrators.

SEC. 4. *Be it further enacted, etc.*, That all laws, or parts of laws, contrary to, or inconsistant with, the provisions of this Act, be and the same are hereby repealed, and that this Act shall take effect from and after its passage and promulgation.

(Signed) LOUIS BUSH,

Speaker of the House of Representatives.

(Signed) LOUIS A. WILTZ,

Lieutenant Governor and President of the Senate.

Approved March 31, 1877.

(Signed) FRANCIS T. NICHOLLS,

Governor of the State of Louisiana.

A true copy:

WILL A. STRONG, Secretary of State.

ACT No. 49, PAGE 48.

Ordering and requiring parish or municipal corporations in the State to receive for taxes and licenses due any parish or municipal corporation prior to January 1, 1879, all valid warrants, scrip or evidence of indebtedness of said parish or municipal corporations.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana in General Assembly convened*, That all parish or municipal corporations in this State shall receive for all taxes and licenses due said parish or municipal corporations prior to January 1, 1879, all valid warrants, scrip or evidences of indebtedness of said parish or municipal corporations, except judgments, without any discrimination as to what years said warrants, scrip or evidences of indebtedness shall have been issued; *provided*, that all valid metropolitan police warrants or scrip for the years 1874 1875 and 1876 shall be receivable only for that portion of the tax levied for the metropolitan police fund and no other, without any discrimination as to the year in which said warrants were issued or said taxes levied; and that all school certificates issued according to law, by any school board shall be receivable for any taxes due any parish or municipality only for that portion of the school tax due by said parish or municipality. The true intent or meaning of this act being to allow the delinquent taxpayers to pay their indebtedness of any year with any kind of valid obligations issued or emmitted by any such parish or municipal corporation in this State, with the restrictions above provided, without any discriminations as to the year in which said warrants, scrip or other evidences of indebtedness were issued or the debt contracted; *provided*, however, that no warrant, scrip or other evidence of indebtedness of any parochial or municipal corporation shall be receivable for any tax or license, unless the same shall, after the passage of this act, have first been examined by the police jury of the parish or the municipal authority of the town or city owing the in-

debtedness, and found valid, and endorsed by them as such; and it shall be the duty of said police juries and municipal authorities throughout the State to pass on the validity of said scrip and other evidences of indebtedness immediately upon the presentation of the same to them; *provided*, no right to plead prescription shall hereby be waived; *and provided further*, that all warrants and certificates condemned by the police jury or municipal corporation shall be so stamped.

SEC. 2. *Be it further enacted, etc*, That all laws or parts of laws contrary to the provisions of this act are hereby repealed.

Approved March 29, 1880.

ACT No. 94 OF 1870. SESSION ACTS PAGE 213.

To order the payment and to provide the means for the payment of the estimate and apportionment of the expenses of the Board of Metrolitan Police, assessed and applicable to the cities, parishes and police juries within the Metropolitan Police District, and to more fully define the duties of the State Treasurer.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana in General Assembly convened*, That the Councils of the cities of New Orleans, Jefferson City and Carrollton, and the police juries of the towns of Algiers and Gretna, and of the parishes of Orleans, Jefferson and St. Bernard, shall promptly pay and provide the means for the prompt payment of the proportion of expenses applicable to the said cities of New Orleans, Jefferson City and Carrollton, and the police juries of the towns of Algiers and Gretna, and of the parishes of Orleans, Jefferson and St. Bernard, according to the estimate and apportionments made by Board of Commissioners of Metropolitan Police, and which are now binding upon them.

SEC. 2. *Be it further enacted, etc.*, That the said cities, towns, police juries and parishes shall promptly pay and provide means for the payment of all such future estimates and

apportionments applicable to them, when such estimates and apportionments shall become binding upon them.

SEC. 3. *Be it further enacted, etc*, That it shall be the duty of the treasurers of the cities of New Orleans, Jefferson and Carrollton, and the treasurers of the parish of Orleans, right bank, parish of Jefferson, right bank, parish of Jefferson, left bank, and the parish of St. Bernard, to pay over to the State Treasurer all sums of money received on account of the sum due and owing to the Metropolitan Police Board, within five days after the receipt of the same; and in the event of any of the aforesaid treasurers failing to comply with the foregoing provisions, they shall be deemed guilty of misdemeanor in office, and shall be liable to a fine not exceeding five hundred dollars, or imprisionment not more than thirty days.

SEC. 4. *Be it further enacted, etc.*, That it shall be the duty of the State Treasurer to notify in writing the Board of Metropolitan Police, within five days after the receipt of any moneys from the treasurer of any of the municipal corporations and police juries within the Metropolitan Police District, the sum received and from whom; and it shall be his duty to pay over all such moneys when demanded of him by the board in accordance with section twenty-eight of an act entitled An Act to amend and re-enact an act entitled an act to establish a Metropolitan Police District, and to provide for the government thereof, approved September fourteenth, one thousand eight hundred and sixty-eight, and approved March eighth, one thousand eight hundred and sixty-nine.

SEC. 5. *Be it further enacted, etc.*, That all ordinances, resolutions, or other acts passed by said Councils of the city of New Orleans, Jefferson City and Carrollton, and the police juries of the parish of Orleans, right bank, parish of Jefferson, right bank, parish of Jefferson, left bank, and the parish of

St. Bernard, passed after the passage of this act, shall be null and void, unless the proportion of expenses applicable to said cities, towns, police juries and parishes within the Metropolitan Police District, and now binding on them, be paid, or means provided for the payment of the same; and for the future, all said ordinances, resolutions and other acts shall be null and void, unless payment is made, or means are provided for the payment of such expenses, from the day they become binding on said cities, towns, police juries and parishes.

SEC. 6. *Be it further enacted, etc.*, That this act shall take effect from and after its passage.

MISCELLANEOUS ORDINANCES, RELIEF, DELINQUENT TAX PAYERS, CONSTITUTION LOUISIANA, 1880.

Be it further enacted, etc., That all taxes and licenses due any parish or municipal corporation prior to January 1st, 1879, may be payable in any valid warrants, scrip or floating indebtedness of said parish or municipal corporation, except judgments.

DEC 8
JAMES H. McKE

153-411

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 981.

THE CITY OF NEW ORLEANS, APPELLANT,

versus

H. W. BENJAMIN ET AL.

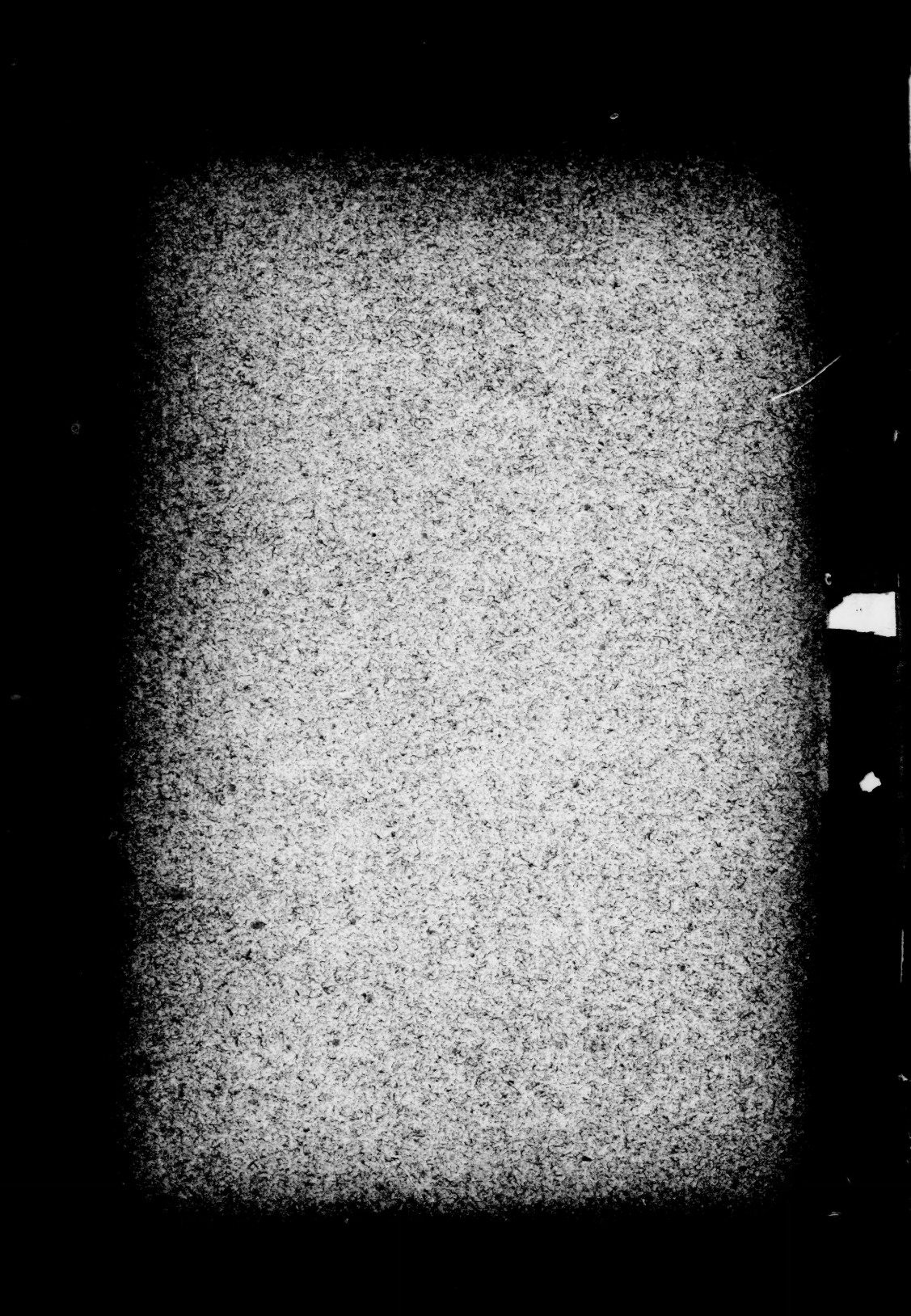
ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Brief of J. D. Rouse and William Grant of Counsel for Appellees.

J. D. ROUSE,
WM. GRANT,
Of Counsel for Appellees.

New Orleans. December, 1893.

L. GRAHAM & SON, PRINTERS, 44-46 BARONNE ST.



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Brief of J. D. Rouse and William Grant of Counsel for Appellees.

This case comes here for the determination of questions of law, propounded and certified by the Circuit Court of Appeals, under the provisions of the 6th section of the Act of March 3, 1891. The following are

THE QUESTIONS:

First. Does the case made by the bill alleging that the board of police had been abolished and left without successor or legal representative, and no provision has been made for the application of its assets to the payment of

its debts, and the answer herein, constitute a suit in equity under the Constitution of the United States, and within the jurisdiction of the Circuit Court for the Eastern District of Louisiana, without regard for the diverse citizenship of the parties?

Second. The warrants and the certificates held by the complainant having been issued for services rendered and supplies furnished under contract with the Board of Metropolitan Police, when the laws required said warrants and certificates to be received by the defendants in payment of all licenses, taxes and other dues, and all such laws having been repealed by the Legislature of Louisiana without making other provisions for the redemption of said warrants and certificates, was this an impairment of the obligation of the contract in relation to such warrants and certificates within the meaning of Art. 1, Sec. 10, of the Constitution of the United States?

Third. Do the pleadings show a suit to recover the contents of choses in action within the meaning of the judiciary act of 1887 and 1888, so as to preclude the complainant, as assignee, from suing in the Circuit Court to establish a fund out of which he, in common with other creditors of the late Metropolitan Police Board, may be paid pro rata upon their claims?

Fourth. Considering all the allegations in the bill of complaint and the provisions in the Constitution and laws of Louisiana respecting the Metropolltan Police Board and the Metropolitan Police warrants and certificates and the redemption and payment of said certificates, does the case show a liability on the part of the city of New Orleans to contribute to a fund for the payment of said warrants and certificates beyond its liability for taxes assessed and collected in pursuance of the apportionments made? (R., p. 6.)

The questions arise out of the pleadings in the case, a statement of which is certified with the questions (R., p. 1 *et seq.*) to which reference is here made.

The bill of complaint, as well as the demurrer and answer of the city of New Orleans, are also in the record, p. 9 *et seq.*

ARGUMENT.

The First and Second Questions

propounded submit whether the bill of complaint and defendant's answer thereto make a case arising under the Constitution and laws of the United States sufficient to give the Circuit Court jurisdiction, independently of the citizenship of the parties and of the assignors from whom complainant acquired ownership of the warrants and certificates, with respect to which he claims relief.

So far as the jurisdiction depends upon the status of the plaintiff and defendants it is not disputed—the plaintiff being an alien and the defendants citizens of the State of Louisiana.

But it is claimed by the defendant that inasmuch as it does not appear that the assignors of the certificates and warrants could have sued the maker in the Circuit Court, the complainant can not, and that jurisdiction is not saved by any Federal question involved in the case.

It may be admitted that if the suit is one to recover the contents of these choses, purely and simply, the Circuit Court had no jurisdiction of the cause in the present state of the record.

Passing this feature of the case for the present, we submit that the case made by the bill involves questions and issues arising under the Constitution of the United States, which, of themselves, give jurisdiction to the Circuit Court without regard to the citizenship of the payees of the choses.

The bill shows that the act of the Legislature and all the subsequent amendments thereto, which were in force when the warrants and certificates were earned and issued, provided means for paying the debts of the Metropolitan Police Board. For this purpose the city of New Orleans and the other municipalities included in the police district, were severally required to pay to the Police Board the amount the board might apportion to each, annually, as its share of the police expenses. These apportionments were the property and assets of the Police Board to which its creditors had a right to look for payment and that it was the duty of the Police Board to collect and apply the same solely to that object. It also appears from the bill that these several municipalities were granted power to levy taxes for the purpose of enabling them to pay the apportionments, but they were not restricted to this mode of raising money to discharge such obligations. And as a further assurance, all the warrants and certificates issued by the Police Board were made receivable for all taxes due to the municipalities to the full amount of each annual apportionment, but not in excess thereof, in any one year.

The bill further shows that there remained due to the board at the time the bill was filed, large balances of said apportionments, which defendants refused to pay or apply to the discharge of said certificates and warrants, which, in equity, ought to be so applied.

It is further alleged that in 1877 the Legislature of the State of Louisiana repealed the act creating the Metropolitan Police Board, as well as all acts supplementary to and amending the same, without making any provision for the payment of its debts, or the application of its property and assets to that object.

All this is set out with particularity in the tenth article of the bill, and in the eleventh article it is alleged that

such repeal impaired the contract of the complaining creditor and others similarly situated, in violation of Art. 1, Sec. 10, of the Constitution of the United States.

This is the case made by the bill so far as the jurisdiction of the Circuit Court depends upon a federal question. The defendant, the city of New Orleans, demurred generally and specially. As a general demurrer admits the truth of all the facts alleged, and is a denial of plaintiff's right to have his case considered thereon in a court of equity (*Giffing vs. Gibbs*, 2 Black. 519), it was competent for defendant to urge, as it did most strenuously, in the Circuit Court—

1. That complainant had an adequate remedy at law, and that he could not reach the equitable assets of the Police Board without first obtaining judgment and exhausting execution.

2. That by the repeal of the law which created the Police Board, the city of New Orleans was relieved of the duty and obligation of paying the apportionments to the discharge of complainant's claims.

3. That Act No. 49 of 1880, passed for the purpose of carrying into effect what is known as the constitutiona ordinance of 1879, provided an adequate remedy for creditors and relieved the city of New Orleans from further liability.

4. That the repeal withdrew from the city the power to levy taxes to pay said apportionments.

5. That this being the case the Circuit Court was without judicial power to grant complainant any relief.

The special clause following the general demurrer points out and insists on these defences in the following language, leaving nothing to conjecture as to the position assumed by the pleader:

"For further cause of demurrer, defendant shows:
"That the bill complains of the repeal by the Legislature

"of Louisiana of the aforesaid act, organizing and re-
"lating to the Metropolitan Police Force and Metropoli-
"tan Police Board; and by reason of said repeal the bill
"alleges that the Metropolitan Police Board was abol-
"ished, and no provision was made, or now exists, for
"the liquidation of its affairs or for the payment of
"the alleged debts of said board; and the bill calls
"upon this court to grant relief for the payment of said
"alleged debts of said Metropolitan Police Board; but
"this defendant shows that the only mode of payment of
"said alleged debts, if any, of the late Metropolitan Po-
"lice Board, a political body for the administration of the
"police force of the city, is by taxes to be levied for the
"purpose, and if it be true, as asserted by said bill, that
"no provision now exists for the payment of said debts,
"this court has no power to direct the levy of taxes for
"said asserted debts, or any power whatever to grant any
"relief in respect to the matters of which said bill com-
"plains" (R. p. 15).

These objections to complainant's right to relief were apparent on the face of the bill, without being set out specially by demurrer. But by the special demurrer the defendant is put on record as asserting that the repeal of the laws creating and relating to the Metropolitan Police Board deprived the city of New Orleans of the authority to levy taxes to pay the apportionments; and that, in consequence, the court was without power to decree payment of the apportionments and direct the levy of taxes for that purpose. To put it in another form, defendant asserts that the city has been deprived of the power to levy taxes for this purpose, and therefore is released by the repealing statute of the duty and obligation of paying at all. As a consequence of this legislation, the defendant finally asserts that the Circuit Court is without power to grant the relief prayed.

It seems to us that the bill and demurrer fully and fairly submitted to the Circuit Court whether the repealing statute and said Act 49 of 1880 had not relieved the city of all liability to pay the balance of the apportionments due the Police Board, except as provided in said Act 49. The issue was decisive of the case, and the court was bound to decide it one way or the other at the outset.

Whether a suit in the Circuit Court is one arising under the Constitution or laws of the United States for the purpose of original jurisdiction, is determined by the questions involved. "If from them it appears that some right, "privilege or immunity, on which the recovery depends, "will be defeated by one construction of the Constitution "or laws of the United States, or sustained by the oppo "site construction, then the case is one arising under the "Constitution or laws of the United States." (*Cook vs. Avery*, 147 U. S. 375.)

The bill in this case sets forth the claims of complainant and the enactment of the State laws impairing his rights, and the reason for coming into the Circuit Court for the relief prayed. The response of the defendant admits all the facts alleged, but asserts as matter of law that the assets of the debtor corporation have been withdrawn from his reach by the repealing act, and that his right of relief is now limited to the remedy provided for in Act 49 of 1880. These issues are to be tested and decided by the Constitution of the United States.

Whether the repealing law and the Act 49 of 1880 did or did not impair complainant's contract, is the question presented for decision. It is a federal question which gave jurisdiction to the Circuit Court, no matter how it might be determined. But if the jurisdiction depends upon a correct solution of the question, we submit that if the repealing act has the effect claimed for it by the demurrer and in argument here, it must be held to impair the contract rights of complainant.

"One of the tests that a contract has been impaired is "that its value has, by legislative enactment, been di- "minished. It is not by the Constitution to be impaired at "all. This is not a question of degree or manner or cause, "but of encroachment in any respect on its obligations."
Planters' Bank vs. Sharp, 6 How. 301.

Thus laws exempting property from execution, passed subsequent to the creation of a debt, have uniformly been held to be such a change in the remedy as to impair the contract of the creditor.
Edwards vs. Keorzy, 96 U. S. 595.

Impairment of contract by a statute affecting the remedy of creditors has been considered in various phases in this court, and it has been uniformly stated as a principle of constitutional construction that all laws which deprive a creditor of recourse against his debtor, or property he had at the time the debt was incurred, are obnoxious to the Federal Constitution, and void.

In *Curren vs. Arkansas*, 15 H. 304, it was held that a law of the State of Arkansas which withdrew the assets of a bank from the possession of its officers and vested the title in the State, without providing a remedy by which a creditor could reach them, was an impairment of the rights of the bill holders. While it was conceded that the law did not touch the right of action against the bank, yet the court held that when a law is so changed that the creditor's means of legally enforcing his contract out of the property of his debtor is materially impaired, it is a violation of the Constitution.

So in *Havthorn vs. Calef*, 2 Wall. 10, it was held that a law relieving stockholders of liability for the debts of a corporation was void as to pre-existing creditors. It was argued that the contract of the creditor was with the corporation, and that the liability of the stockholders was statutory and might be lawfully annulled. But the court

held that the liability of the stockholders was a security, which the creditor had a right to resort to for payment, and that as the law took away this means of payment it impaired the contract of the creditor.

Upon the same principle it has been frequently held that a State law limiting and reducing the rate of taxation in a city or county, which existed at the time a debt was contracted to the prejudice of a creditor of the corporation, is an impairment of his contract. *Fisk vs. Jefferson Parish*, 116 U. S. 131.

Ordinarily, some adequate provision is made for the settlement of the affairs of dissolved corporations and the application of their assets. When this is done creditors can not, as we concede, complain that the mere dissolution of the corporation works any legal injury to them. *Mumma vs. Potomac Company*, 8 Peters, 281.

But where no such provision is made, and it is contended, as it was in this case, by demurrer and argument, that the act of the Legislature dissolving the debtor corporation took from creditors the right to have its assets applied to the payment of their claims and deprived the Circuit Court of the power to grant relief, such a law is clearly an impairment of the remedy, and violates the Constitution of the United States.

The question is not whether a public corporation may be abolished at all while it owes debts, but whether the act abolishing it shall be given the effect of depriving its creditors of recourse against the assets possessed at the date of the repeal of its charter.

The defendant's brief filed here admits that Act 33 of 1874, printed at appendix page 14, which limited the receivability of the Metropolitan warrants to taxes due for years prior to 1874, greatly diminished their value, as by prior acts they were legal payment for *all* taxes, without any limitation as to time; but it is claimed that the said

Act 49 of 1880 (see p. 28 of the brief) affords an adequate remedy in lieu of those possessed by creditors when the Police Board was abolished, both as to scrip issued prior and subsequent to 1874. This act was passed for the purpose of authorizing the then existing parishes and municipalities to retire their floating indebtedness. It makes all outstanding parish scrip or evidences of indebtednesss receivable for all taxes and licenses due prior to January, 1879: but Metropolitan Police warrants are dealt with as follows:

"Provided, that all Metropolitan Police warrants or "scrip for the years 1874, 1875 and 1876 shall be receiv- "able only for that portion of the tax levied for the Metro- "politan Police Fund, and no other." (See defendant's appendix, p. 28.)

It is urged here by defendant, as it was in the Circuit Court on the hearing of the demurrer, that this Act No. 49 provided, before this suit was brought, an ample remedy for the creditors of the abolished corporation, and that therefore there has been no impairment of contract which they can now complain of.

The argument is based on the assumption that it was within the legislative power to relieve the city of its liability to pay in cash the apportionments due to the Police Board when it was dissolved, and to substitute for that liability an obligation merely to receive scrip issued by the board for taxes levied for police purposes. In other words, it is claimed that the Legislature may lawfully destroy the equitable assets of the board, which were pledged to the payment of its debts, and remit creditors to another and different mode of relief, which in this case is manifestly of little, if any, value. It is admitted that there is more than enough due by the city on the apportionments to pay all warrant holders, but it is at the same time conceded that the city has been unable, after nearly twenty

years of diligent effort, to collect a sufficient amount of the tax levied for police purposes to extinguish this outstanding scrip. R., p. 5, fol. 10.

Indeed, the whole burden of the defence is that the tax levy has failed to produce sufficient funds to pay either the apportionments or the outstanding scrip, and that, therefore, the city is subject to no further liability.

If the defendant's answer can be considered in determining whether a federal question is involved, it is evident that none of the contentions raised by the demurrer have been abandoned. At page 22 of the record is the following clause in defendant's answer:

"This defendant refers to the acts organzing the Metro-"politan Police Board to show the character of said "board, and also to the repeal of said acts, and submits "whether the matters alleged in the bill entitle the com-"plainant to aid in this court, or in any court."

This clause is preceded by an averment, at page 21 of the record, which denies that the repealing act was void in any respect or to any extent. This is an assertion in the final pleading of the defendant that the repealing act deprived complainant of all remedy, and a reiteration of the same defences asserted by the demurrer.

But even if defendant intended by answer to abandon the federal questions raised by demurrer and place the defence on other grounds, it can not be permitted to do so for the purpose of defeating the jurisdiction of the Circuit Court after it has once attached. (See *Cook vs. Avery*, 147 U. S. 375.)

Counsel for defendant in their brief suggest that even if the Act of 1877 undertook to deprive creditors of any right to tender warrants and certificates for taxes, still they can not complain, because the State Constitution of 1880 restored that right, and in this respect suspended the Act of 1877 and enlarged the right.

This constitntional provision is in the following words:

"Be it further ordained, that all taxes and licenses due "any municipal corporation prior to January 1, 1879, may "be payable in any valid warrants, scrip or floating in- "debtedness of said parish or municipal corporation, "except judgments."

Act 49 was passed to carry this ordinance into effect. But it is to be noted that the constitutional ordinance refers solely to the obligations of parishes and municipalities given for their own debts, and imposes no obligation on the city of New Orleans to provide in any manner for Metropolitan Police warrants and certificates, which have never been considered nor admitted to be debts of the city, nor does Act 49 of 1880 recognize them as debts of the city, nor require the city to recognize them, except as tender for taxes levied for police purposes during the years 1874-75-76. As warrant and certificate holders were entitled to be paid in cash out of the apportionments due by the city to the Police Board, the constitutional ordinance and the Act 49 of 1880 operated as a restriction on their rights instead of affording relief. Yet it is asserted these laws exclude all other recourse by the creditors against the city.

A summary of the laws relating to the Metropolitan Police Board shows:

1. That all statutes on the subject were mandatory in their character and required the city of New Orleans and other municipalities composing the police district to pay the amount apportioned against them, and to levy and collect a sufficient tax to discharge that obligation.

2. That these statutes, up to 1874, made scrip issued by the board receivable for all taxes due to the municipalities, without any limitation, except that the municipalities should not be required to receive scrip for any one year in excess of the annual apportionment.

3. That Act 33 of 1874 required taxes levied for these apportionments to be paid in cash; providing, however, that scrip issued prior to January 1, 1874, should be receivable for taxes due prior to that year, except for the interest, school, park taxes, etc., and in this respect depriving the scrip holders of the right to use them in payment of all taxes, as permitted by prior laws.

4. Act No. 35 of 1877 repealed all these laws, relieving the municipalities of the duty and obligation of paying the apportionments, and withdrawing the power of levying taxes to pay them, and leaving the creditors of the Police Board without a debtor whom they could sue, and providing no remedy for the application of the assets of the board to the payment of its debts.

5. Three years later Act No. 49 of 1880 was passed, pursuant to a constitutional ordinance of the State, which made the scrip receivable only for the taxes levied for the police fund in the years 1874-75-76.

The defendant claims by demurrer, answer and argument that it was competent for the Legislature to enact these laws, and that if they impaired the remedy of the scrip holders, said Act 49 gave them a new and ample remedy.

On the other hand, complainant asserts that the statute of 1877 was in contravention of the Constitution of the United States, and that Act 49 of 1880, so far as it is claimed by defendant to be an adequate remedy in lieu of those previously taken away, is itself an impairment of his contract.

As these contentions must be determined by a resort to the provisions of the Constitution of the United States, and are decisive of the rights of the parties, they clearly make a case arising under that Constitution, of which the Circuit Court had original jurisdiction.

The Circuit Court having jurisdiction *ratione materia*, the first question also submits whether or not

THE CASE IS ONE OF EQUITABLE COGNIZANCE.

The dissolution of the Metropolitan Board, by legislative act, without providing for the payment of its debts or appointing a representative, took from the creditors the action they had against their debtor for the satisfaction of their claims. The effect of such an act is to pronounce the legal death of the debtor without appointing an administrator who can be sued. It abates all pending actions and renders it impossible to bring a new suit against the debtor.

Mumma vs. Potomac Co., 8 Pet. 281.

The act therefore of itself was an impairment of their rights which gave the Circuit Court equitable jurisdiction. As the State law thus impaired the remedy it was an invasion of the contract rights of the creditors, and as the peculiar relief here sought grows out of the necessities forced upon them by that law the jurisdiction of the Circuit Court, in equity, may be truly said to arise under the Constitution of the United States.

The only remedy left to the creditor is to establish a trust against such assets as the corporation may happen to own at the date of the dissolution, and seek payment out of them. (*Broughton vs. Pensacola*, 93 U. S. 266.) But if the assets happen to be insufficient the creditor can have no judgment against any one for the deficiency.

The destruction of a corporation by the repeal of its charter does not destroy its rights of property or its choses in action. No suit can thereafter be maintained against it, but the rights of its creditors are not annihilated, "and the courts may, if the Legislature does not provide some special remedy, enforce such rights by means within their power."

Greenwood vs. Freight Co., 105 U. S. 13.
Mumma vs. Potomac Co., 10 Pet. 281.
Sturges vs. Vanderbilt, 73 N. Y. 384.

"The ancient doctrine, that upon the repeal of a private corporation its debts were extinguished and its real property reverted to its grantors, and its personal property vested in the State, has been so far modified by modern adjudications that a court of equity will now lay hold of the property of a dissolved corporation and administer it for the benefit of its creditors and stockholders. The obligation of contracts, made whilst the corporation was in existence, survives its dissolution; and the contracts may be enforced by a court of equity so far as to subject for their satisfaction any property possessed by the corporation at the time. In the view of equity its property constitutes a trust fund, pledged to the payment of the debts of creditors and stockholders, and if a municipal corporation, upon the surrender, or extinction in other ways, of its charter is possessed of any property a court of equity will equally take possession of it for the benefit of the creditors of the corporation.

Broughton vs. Pensacola, 93 U. S. 266.
Merriweather vs. Garrett, 102 U. S. 512.

The charter of a municipal government can not be so dissolved as to impair the obligation of a contract, or preclude the creditor from recovering his debt. 1 Dill. Municipal Cor., Sec. 114.

The destruction of the Board of Police by the repealing act deprived its creditors of their action at law against it for the enforcement of their demands, and left them without remedy except in a court of equity, which in the language of the decisions above quoted "will lay hold of its property and administer it" for their benefit. Judgment at law and fruitless execution is not required, because impossible, in the absence of an existing debtor.

"If a claim is to be satisfied out of a fund which is accessible only by the aid of a court of chancery, application may be made in the first instance to that court, which will not require that the claim should be first established in a court of law."

Russell vs. Clark's Exrs., 7 Cranch. 69.
Innes vs. Lansing, 7 Paign's Chy. 583.
Case vs. Beauregard, 101 U. S. 688.
3d Pomeroy's Eq. 464, note 4.

And it has been held by this court that by the French jurisprudence prevailing in Louisiana, a creditor may exercise the right of action of his debtor, and that "the right thus claimed for the creditor may very properly be pursued in a suit in equity, since it could not be pursued in an action at law in the courts of the United States, and all existing rights in any State of the Union ought to be suable in some form in those courts." *New Orleans vs. Gaines*, 131 U. S. 191-213.

This case is therefore one of equitable cognizance.

THE THIRD QUESTION

involves a further consideration of the jurisdiction of the Circuit Court. Its jurisdiction of this case is assailed on the ground that the complainant, although an alien, is assignee of the claims he holds, the assignors thereof being citizens of Louisiana, of which State the defendants are also citizens. Also on the ground that some of the intervenors are citizens of Louisiana, and that complainant's suit is really for their benefit.

The objection is founded upon the theory that the warrants and certificates held by complainant are choses in action, his title to which is derived through assignment by citizens of Louisiana; that he is suing *to recover their contents*, and that the exercise of jurisdiction is therefore prohibited by the Act of March 3, 1887, which provides

that the Circuit Court shall not "have cognizance of any suit except upon foreign bills of exchange *to recover the contents* of any promissory note or other chose in action in favor of any assignee * * * unless such suit might have been prosecuted in such court *to recover said contents* if no assignment or transfer had been made."

"The contents of a contract, as a chose in action, are the rights created by it in favor of a party in whose behalf stipulations are made in it, which he has a right to enforce in a suit founded on the contract; and a suit to enforce such stipulations is a suit to recover such contents. *Corbin vs. County of Black Hawk*, 105 U. S. 665.

Necessarily a suit to recover the contents must be brought *against* the party who made the stipulation, as in the case of a promissory note against the maker, or upon a bond against the obligor. In such case the assignee of the contract, note, or other chose in action, can not sue in the Circuit Court, unless his assignor might have done so, because the suit is one to recover contents, and so within the exception of the statute. But this exception has never been extended to a case not clearly within it.

Thus it has been held not to apply to a suit by an assignee of a chose in action to recover possession of the thing in specie, or damages for its wrongful caption or detention.

Deshler vs. Dodge, 16 How. 631.

Ambler vs. Eppinger, 137 U. S. 480.

Bushnell vs. Kennedy, 9 Wall. 387.

The supposition that Benjamin is suing to recover "contents" is founded upon a misapprehension of the nature of the suit. As shown above, such a suit could have been brought only against the Board of Metropolitan Police. There is no privity of contract between the city of New Orleans and the holders of such obligations of the board to support an action at law, and if such suit were brought it would be dismissed upon demurrer.

But the complainant, upon the assignment of such obligations of the board to him, became a creditor thereof. When the board was annihilated he was left without any remedy against it.

He, in common with all other creditors thereof, had a right to have its assets realized and applied, as far as they would go, to the payment of its creditors, including himself.

This could be done only by a creditor's bill, the foundation of which is the existence of a debt or debts, the object of such a bill always being to reach assets which can not be otherwise recovered at law.

Hence the complainant's bill was brought not only in behalf of himself but of all other creditors similarly situated, not to recover contents, but to establish a fund out of which all should be paid *pro rata*. A suit to recover the contents of a chose in action is one to enforce the obligation thereof *in toto*. In this case complainant could have no decree for the deficiency, if the fund prove insufficient to pay him and all other creditors in full. The bill shows the necessity as well as propriety of proceeding as it does against the debtors of the board, the amounts owing by them constituting its sole assets, and the complainant being an alien, he was competent to sue in the Circuit Court.

The case of *Bean vs. Smith et al.*, 2 Mas. R. 252, decided by Judge Story, establishes his right to sue in that court, notwithstanding he is a creditor by assignment. The plaintiff in that case was assignee of certain inland bills, upon which he recovered judgment, and then brought a bill in the Circuit Court upon his judgment to set aside fraudulent conveyances of real estate by his debtor. Objection to jurisdiction was made because he was an assignee and his assignor could not have sued in that court. In overruling the objection, the court among other things said:

"But in truth, the suit is not, strictly speaking, founded solely upon a judgment. The judgment is collateral. It forms an ingredient, and an essential ingredient, in the case; but it is not the whole of the case. The plaintiff seeks for relief against fraudulent conveyances of property, executed by the defendant, Simon Smith, to the other defendants, for the alleged purpose of defeating the plaintiff of his just rights as a creditor under the judgment. It is these fraudulent conveyances which constitute the immediate groundwork of the suit, and so far as respects all the defendants, except Simon Smith, the sole groundwork of the suit. They were never liable, either upon the original bills or judgment, *nor had the plaintiff any claim against them, in his mere character as assignee.* If they are liable to him at all, it is because they are parties to a meditated fraud to his injury, or as trustees holding property for his use. The right to sue them is not a right which vested in another person, and has passed to him by assignment. It is a right, which originally sprung up after the assignment to him, and from new transactions. And the same observations apply with equal force to Simon Smith. It is not his liability to the plaintiff under the original assignment of the bills of exchange endorsed by Simon Smith, that is now in question, and is now sought to be enforced; but a new right collateral to that growing out of a direct judgment between the parties and asserted fraud injurious to the plaintiff, which has been devised to avoid the satisfaction of that judgment. *It is perfectly clear that the statute never contemplated an exclusion of jurisdiction in cases where a mere negotiable instrument, or chose in action was mixed up in the ingredients of the case; but where that chose in action constituted the sole cause of action, and the assignment constituted the whole ground of plaintiff's right.*"

This decision is quoted with approval in *Ober vs. Gallagher*, 93 U. S. 206.

The intervenors come in merely for the purpose of participating in the distribution of the fund in which they are entitled to share. They present ancillary cases only, of which the Circuit Court always takes jurisdiction without regard to the citizenship of the parties.

Stewart vs. Dunham, 115 U. S. 61.

Krippendorf vs. Hyde, 110 U. S. 276.

Pacific R. R. vs. M. P. Railway, 111 U. S. 521.

Phelps vs. Oaks, 117 U. S. 236.

On such a bill it is error in granting relief, to confine it to the creditor complaining.

Johnson vs. Waters, 111 U. S. 640.

THE FOURTH QUESTION

involves the merits of the controversy and an examination of the Constitution and laws of Louisiana applicable to the case made by the bill.

The theory of the bill is that when the apportionments of police expenses to the corporations in the district, made by the board became final, they were absolute obligations of such corporations, which they were bound to discharge by payment, and that whatever amounts remain unpaid are assets of the board applicable to the payment of its debts.

The theory of the defence is that such corporations were bound only for the taxes levied *and collected* by them for police purposes.

That the apportionments, when they became final, were absolute obligations imposed upon the city is manifest from the acts of the Legislature in relation thereto.

These acts are printed in appendix to appellant's brief.

By act of the Legislature of Louisiana (No. 74), approved September 14, 1868 (La. Acts 1868, p. 85), the Metropolitan Police District of New Orleans, State of Lousiana, was created, embracing therein the parishes of

Orleans, Jefferson and St. Bernard, and the government of said district, for police purposes, was vested in a board of commissioners created by the act called "The Board of Metropolitan Police." The city of New Orleans was within the district.

By Sec. 27 of said act said board was required to make annually an estimate of the expense of maintaining a police force, including their salaries; to apportion said expenses to the several cities and parishes in the Metropolitan District, and to submit said estimate and apportionment to the mayors of said cities, and to the police juries of the parishes, which, in the absence of objections, or if objections were made and overruled, became final and binding upon said corporations.

By Sec. 29 the councils of the several cities and the police juries of the parishes were empowered and "directed annually to order and *cause to be raised and collected*, by the tax upon the estates, real and personal, subject to taxation according to law * * * the sums of money as aforesaid annually estimated and apportioned as the share of such cities and parishes of the said total expenses of the Metropolitin Police District."

These provisions were repeated in Act 92 of 1869, Secs. 25 and 27, appellant's appendix, pp. 7 and 8.

Under these provisions of law a metropolitan police was established in 1868 in the city of New Orleans and adjoining municipalities, and continued until abolished on the 31st of March, 1877, by the repeal of the law creating it, and all laws amendatory thereof. Appellant's appendix, p. 24.

Said Police Board annually made the estimate and apportionment of its expenses, and notified the mayors of the municipalities and the police juries within the district thereof as required by the act, and it does not appear that any objection was made thereto.

It has not been suggested that the Legislature was without power to subject municipal corporations of its creation to such liabilities and its power so to do is undoubted.

The city of New Orleans from the very beginning resisted the mandate, and its opposition to its execution continued during the whole existence of the board, and still continues, as this suit shows. For the first year she refused to levy or collect any taxes for the payment of her apportionment.

Because of the city's default the board was without funds, and her warrants were sold at a ruinous discount. The Legislature undertook to remedy this state of affairs, and by Act 44 of 1869 (p. 42, Appendix p. 9), made such warrants receivable for *all* parish and municipal licenses and taxes within the limits of the "Metropolitan Police District," not exceeding the amount of the apportionment. Section 3 of said act made any officer who refused to receive such warrants for taxes as above provided liable to the "party offering them in all actual damages sustained by such party, and in exemplary damages for at least double the amount of the taxes so refused to be received."

By the act of February 26, 1870 (p. 74, Appendix p. 10), such warrants were made receivable not only for taxes and licenses, but for *all debts* due or to become due to the parishes and municipalities in the district; and more stringent penalties were imposed upon any treasurer who should refuse to receive them, even to the forfeiture of his office.

Then came the Act No. 94, of March 30, 1870 (Acts, E. S. p. 213, Appendix p. 29), which declared that the councils of the cities, and the police juries of the parishes in the Police District "shall *promptly pay* and *provide the means for the prompt payment* of the proportion of expenses applicable to the said cities," etc., "according

to the estimate and apportionments made by Board of Commissioners of Metropolitan Police, *and which are now binding upon them.*" This was a confirmation of the apportionments, by legislative sanction, and a mandate was laid upon the municipal and parish legislative bodies, to discharge their obligations. Immediate payment and immediate provision for payment was commanded; the means were left to their discretion. The power of taxation still remained whereby they could be reimbursed.

By Sec. 2 of the act they were also required to "promptly pay and provide the means for the prompt payment of all such future estimates and apportionments" when they became "binding upon them;" and by Sec. 4 their treasurers were to pay over to the State Treasurer all moneys received on account of the sum due and owing to the Metropolitan Police Board within five days after the receipt of the same," under the penalty of fine or imprisonment.

Section 5 of said act further provided that all ordinances, resolutions or other acts passed by the council of said cities or by said police juries, passed after the passage of this act, should be null and void, unless their respective proportions of police expenses were paid or the means provided for the payment of the same, and which proportions were declared to be binding on them.

Police warrants still being at a discount, because of the delinquency of the city, the act of March 26, 1873 (Acts, p. 120), authorized the board to issue to officers and members of the police warrants for sums sufficient to realize in currency the amounts severally due them at the annual rate provided by law and to charge the amount allowed for discount to the corporations and provided that the same should become a debt against such corporations. Appendix to this brief, p. 27.

The Act No. 16, of March 24, 1875 (Acts, p. 35; Appellant's Appendix, p. 19), entitled "An act to enforce the payment by the city of New Orleans and the several cities and parishes of the Metropolitan Police District of the apportionment made upon them by the Board of Metropolitan Police," etc., divided the apportionment into twelve equal parts and required one of such parts to be paid in full every month.

If they were in excess of the amount actually required in any one year the surplus would go to reduce the apportionment for the next year.

The whole course of legislation in relation to the Police Board shows a determined and persistent effort to compel the city of New Orleans and other municipal corporations to pay their apportionments regardless of the taxes levied and collected by them for that purpose. While they were authorized to raise the amount by taxation they were commanded in most peremptory terms to *levy and collect enough* taxes to pay their respective apportionments. The master's report shows that the city of New Orleans failed to do so, and that she owes a balance of $241,106.54 on that account. (R., p. 5.) But there is nothing in the acts which limited her to the levy of taxes for the purpose of raising the required amount. The Act No. 94 of 1870 (Appellant's Appendix, p. 29), required her "*to promptly pay and provide the means for the prompt payment*" of her apportionments. Notwithstanding this peremptory command, it is seriously contended by the appellant, that if the city made an insufficient levy or failed to collect enough of the police taxes to pay her apportionments she could not be compelled otherwise to pay the balance due.

It is also contended that because of a limitation upon the rate of taxation contained in Act No. 7 of 1870 (Appellant's Appendix, p. 12) that the city could not levy a

police tax of sufficient amount to meet her apportionments. An examination of the act referred to shows that the limitation was upon taxation *for the purposes of that act*, and said act gave the city no authority over, and imposed no duty in relation to the police. The Act No. 73 of 1872, p. 124 (Appellant's Appendix, p. 13), expressly authorized the city of New Orleans to levy "a police tax *additional* to all taxes levied in the month of December, 1871, for the purpose of defraying the police expenses of the year ending September 30, 1872. Sec. 16 of said act is as follows:

SEC. 16. *Be it further enacted, etc.*, That no general provision in any general law of the State limiting the power of taxation by the several cities, towns, parishes and other corporations, shall be held to apply to any of the taxes of the city of New Orleans, *herein or otherwise specially authorized to be levied.*"

In the face of this provision how can it be contended that there was any limitation upon the power to levy taxes for police purposes? Indeed we have never been able to see any force in the contention that the limitation under the Act No. 7 of 1870 could affect the power to levy police taxes specially authorized and commanded in the acts above set forth even if the above act had not been passed. The legislative command was to levy and collect *enough taxes* to pay her apportionment.

There is another aspect of the case worthy of consideration. If as contended the city was liable only for such police taxes as she levied and collected, the fund thus raised, if any should be collected, was diverted and directed to be applied otherwise by the Act No. 67 of 1884 (appendix to this brief p. 27), which transfers all the uncollected revenues, prior to the year 1879, to the Board of Liquidation, which when collected are to be applied either to the payment of interest on the bonds

authorized by the act or to their redemption and cancellation. When complainant filed his bill this act was and still is in force. If it be valid, the supposed remedy of complainant under the act and Constitution of 1880 was by it taken away.

The fourth question should be answered in the affirmative.

Respectfully submitted,

J. D. ROUSE,

WM. GRANT,

Of Counsel for Appellees.

New Orleans, December, 1893.

APPENDIX.

Extract from Act No. 64, of March 26, 1873, p. 120.

No. 64.

AN ACT.

To provide for a full and prompt payment of the members, officers and employés of the Metropolitan Police by authorizing the issuance of additional warrants to make up losses which may hereafter be sustained by members, officers and employés, by reason of the depreciation of Metropolitan Police warrants; to make such warrants so to be issued for discount receivable for taxes, by and chargeable (pro rata) to the general corporations of the Metropolitan Police District, and to provide a penalty for refusal to receive the same, and to limit the power of the Board of Police Commissioners to issue such additional warrants.

WHEREAS, The act creating the Metropolitan Police force provided for and contemplated the payment of the members, officers and employés thereof in currency, and from a variety of causes they have not been so paid, but have been paid in paper known as Metropolitan Police warrants, which warrants have been at a discount varying from 2 to 40 per cent., and the price realized by the sale of said warrants is an inadequate and insufficient compensation for the arduous duties of a policeman, while it materially interferes with the efficiency of the force;

WHEREAS, It is but just and proper that the members, officers and employés of the said police force should be paid in full the several sums provided by law; therefore,

SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana in General Assembly convened*, That so long as the said Metropoli-

tan Police warrants shall be at a discount in the money market of the city of New Orleans, it shall be lawful for the Board of Metropolitan Police, and they are hereby authorized and directed to issue monthly to each and every member, officer and employé of the police, in payment of services rendered, a warrant for a sum sufficient to realize in currency the amount severally due said members, officers and employés at the annual rate, as is severally provided for in Sections 2281, 2285, and 2286, Revised Statutes of 1870: *provided*, that the amount due each member, officer or employé of said police force shall be subject to the deductions for neglect of duty, disobedience of orders, etc., ordered by the Board of Police Commissioners, in accordance with Section 2252 of the Revised Statutes of 1870.

SEC. 3. *Be it further enacted, etc.*, That the sums allowed as discount to the members, officers and employés of the Metropolitan Police force, shall be chargeable *pro rata* to the several corporations comprising the Metropolitan Police District, and the same shall become a debt against each of the said corporations, in addition to the sum assessed and made final against said corporations by the Board of Police Commissioners on the 16th day of October, 1872, and that in any future assessment made by the Board of Police Commissioners against the several corporations comprising the Metropolitan Police District, any discount to which said warrants may be subject shall be a legal and proper charge against the said corporations comprising the Metropolitan Police District, so long as it may be necessary to issue said warrants, and no longer.

* * * * * * *

SEC. 4. *Be it further enacted, etc.*, That all warrants for discount issued to the members, officers and employés of the Metropolitan Police force shall be and the same are hereby made receivable for all parish and municipal

licenses and taxes within the limits of the Metropolitan Police District, to-wit: the parishes of Orleans, Jefferson and St. Bernard, and the cities of New Orleans and Carrollton, and that any parish or municipal officer who shall refuse to receive said warrants so issued, for discount as herein provided for the payment of taxes and licenses due to either of said parishes or cities comprising the Metropolitan Police District shall, with his securities on his official bond, be liable *in solido* to the party or parties offering therein in all actual damages sustained by such party or parties, and in exemplary damages for at least double the amount of taxes or licenses so refused to be received, *provided* that the allowance so issued in excess of the regular salary of the officers and members of the police force shall not exceed 20 per cent. of such salary due.

* * * * * *

Extract from Act No. 67, Louisiana Acts 1884, p. 89.

SEC. 3. *Be it further enacted, etc.*, That Sec. 5 of Act No. 133, approved April 10, 1880, be amended and re-enacted so as to read: That it shall be the duty of the city of New Orleans to turn over and transfer to the Board of Liquidation, immediately after the passage of this act, all property of the city of New Orleans, real and personal, not dedicated to public use; *provided*, that in the sale of batture property, which is herein included, the right of the city to all future accretions shall be reserved, all assets of said city realized and to be realized, except such assets and revenues as pertain to the administration of said city, and necessary for the support of the same as at present authorized, *all uncollected revenues of said city anterior to the year 1879*, when collected. And the said board is hereby authorized and required to dispose of said property and

assets, other than stock held in corporations, on such terms and conditions as said board may deem to be to the best interests of the city, and apply the proceeds thereof, *together with the uncollected revenues above mentioned*, when the same are collected: *First*, to the payment of the interest on the bonds authorized herein in the event that the tax authorized by Sec. 11 of said Act No. 133, approved April 10, 1880, be not levied: *second*, to the redemption and cancellation of the said bonds, provided, that bids for the sale of the same shall be by sealed proposals, and that preference shall be given to the lowest bidder: and *provided further*, that no bids above the par value of said bonds shall be accepted.

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JAMES H. MCKENNEY
Clerk

IN THE SUPREME COURT

No. 10,365

THE CITY OF NEW ORLEANS, APPELLANT,

vs.

HENRY W. BENJAMIN, APPELLEE.

Supplemental Brief for the City of New Orleans.

HENRY O. MILLER,
For Defendant.

Henry Rivers' Print & Engraving Co.

UNITED STATES SUPREME COURT

No. 15,365.

THE CITY OF NEW ORLEANS, APPELLANT.

versus

HENRY W. BENJAMIN, APPELLEE.

Supplemental Brief for the City of New Orleans.

Since the filing of the Defendant's original brief on the questions, the Complainant has submitted his brief, which requires some attention: The defendant, therefore, proposes to review the positions assumed by the Complainant in so far as an answer beyond the defendant's brief already filed, is deemed pertinent.

In the brief for the Complainant it is urged that the demurrer to the bill concedes, that the case made by the bill, arises under the Constitution of the United States. It is understood the brief maintains that the demurer concedes also, that the act of the legislature of Louisiana, No. 35 of 1877, sought to deprive Complainant of rights claimed under the legislative acts of 1868 and 1869 creat-

ing the Metropolitan Police. On this theory of the effect of the demurrer that brief maintains this Court must answer affirmatively the first and second questions submitted, that is, must instruct the lower court the Complainant's case arises under the Constitution of the United States, and also that the asserted contract was impaired by the legislation of Louisiana. It would appear from this theory advanced in the brief, that the the jurisdiction of the Circuit Court, and by the same course of reasoning, of this Court, does not depend at all. on the character of the controversy developed by the bill and answer, but is conclusively settled by the demurrer: hence, the conclusion must be, if the Complainant's theory is allowed, that if in a bill containing a variety of other matters, there is introduced an allegation of the impairment of complainant's asserted contract, and the defendant demurs to the bill. the court must take jurisdiction of the case as one arising under the Constitution of the United States and as exhibiting an impairment of a contract. This too, is the conclusion of the Complainant's brief although the demurer overruled, the defendant answered. denying all the allegations of the bill tending to show any case arising under the Constitution of the United States or any impairment of the asserted contract. On this theory

it would seem, the jurisdiction of the Courts of the United States, is fixed by a demurrer to the bill for want of equity, even though followed by an answer in which the jurisdictional allegation is expressly denied. It is the exaction of the Complainant's argument that this Court shall maintain that theory.

The bill asserts the city of New Orleans is liable under the legislative acts of 1868 and 1869 for the amount of certain apportionments made by the Metropolitan Police Board against the city for its share of police expenses. This alleged liability is all the bill asserts, and is alone, that in respect to which the bill claims relief, i. e., payment of the apportionments. The only legislative act assailed in the bill is that of 1877 Appendix to defendant's original brief. p. 24. That act it is manifest on inspection, was enacted to change thepolice system of New Orleans, and is the subject of the charge in the bill that Complainant's asserted contract has been violated by the legislature of Louisiana. See bill and prayer, paragraphs 1 to 7, 10, 11, Record, pp. 9 to 14. The defendant demurred to the bill for want of equity, with the special cause assigned that "if it were true," as asserted in the bill, that there was no provision for payment of the obligations held by Complainant issued by the Metropolitan Police Board, a muni-

cipal corporation, then there was no jurisdiction in equity to give relief. Demurer, Record, page 14.

If taxes are provided to pay municipal obligations, the right to the tax is part of the contract of the creditor. The remedy is at law not in equity to enforce their levy and application And no attempt of legislative withdrawal of these taxes and payment of the obligations will be permitted. High, Extraordinary Remedies, page 369; Von Hoffman vs. Town of Quincy, 4th Wallace, p. 535; 9th Wallace, p. 735. The bill averred that all laws relating to the Metropolitan Police had been repealed, and there was no provision for payment of Complainant's police warrants and certificates Bill, par. 10. The demurrer of course, referred to this allegation in the bill. If it were true, there was no provision for payment of the warrants and certificates, then the significance of the demurrer was simply, that Equity could not give relief. The allegation in the bill seemed to place the complainant in the predicament of the Complainant, in the case cited below where the creditor of a municipal corporation alleged as the basis for relief, that all taxation for payment of his obligations had been withdrawn and the Court held on demurrer, that he had no standing in Equity. Heine vs Levee Commissioners, 19th Wallace, page 660. It is difficult to follow the Complainant's brief in

all its reasoning to extract the potency from the demurrer adequate to sustain his conclusions But it is confidently submitted, the special demurrer only indicated the legal remedies of the municipal creditor, and the absence of any equitable jurisdiction, if the Complainant was in the predicament stated in the bill. If the demurrer carried the admission of a constitutional question or the still more remarkable element of impaired contract, it is not easily detected, even with the aid of Complainant's brief.

The demurrer, in other respects, is the general demurrer for want of equity. It has not been supposed that mode of pleading, did more than test the sufficiency of the bill, and for that purpose only, admitted allegations of fact in the bill. It is the theory of the other side the general demurrer is of far greater import. But, it is submitted, that the demurrer does not admit, even for purposes of the demurrer, the conclusion of law announced in the Complainant's brief, that the legislative act of 1877 impaired his supposed contract. Story's Equity Pleadings, § 452. Nor does the demurrer conclude the defendant from contesting by answer after the demurrer has over-ruled all allegations in the bill. 1st Daniel's Chancery, S. P. 675. The defendant's answer denies the averment inserted to show the jurisdiction. Answer, Record, p. 21. It is there-

fore submitted that all that portion of the argument of the Complainant to give to the demurrer the force of admitting the federal question or supposed impairment of contract right, must fail of its purpose.

But in the Complainant's brief it is insisted that the line of defence and argument of the defendant, concedes that the case involves a federal question. Whether a suit is within the jurisdiction of the Courts of the United States is usually determined by the pleadings and by the law. The Complainant's theory would seem to be the jurisdiction depends on the argument. The answer in this case, as already stated, negatives by denials any shadow of basis for any federal question. To support his contention Complainant undertakes to maintain, that the defendant claims the legislations of Louisiana of 1877 and of 1880 and other acts, relieved the City from the asserted obligation to pay the apportionments. It will be borne in mind that the bill presents the single issue, whether the City is liable for the apportionments. Now, it may be convenient, for the complainant in his effort to force a federal question to say that the defendant seeks relief from the apportionments under cover of subsequent legislative acts. But the City makes no such defense. It does not invoke against the asserted liability Act

No. 35 of 1877, nor the Act No. 49 of 1880, nor any legislative act the Complainant introduces in this discussion. None of these acts are even mentioned in the answer, save that of 1877, and of that the answer affirms it preserved in full force all the provision made for payment of the warrants and certificates. Far from any claim that the act of 1877 relieved the City from any obligations imposed by the Metropolitan Police acts, it is explicitly maintained that the act of 1877, neither changed or attempted to change or affect in any manner or in any degree the rights and remedies of holders of these Metropolitan warrants. Answer, p. 21. The answer and argument of the City disputes the pretended liability of this City for the apportionments, as never existing either by the terms of the Metropolitan Police acts or by any rational implication based on the acts. The defense is, that these apportionments, but estimates of the probable police expenses of the future year, were never debts of the City but were designed simply and only, to afford the basis on which the City was to levy the Metropolitan Police taxes. the taxes being the provision made by the law for the payment of the police warrants, certificates and other police expenses. Hence, the answer maintains that under the Metropolitan Police acts the only liability of the city is for the Metropolitan Police taxes collected.

See answer of the City, Record, pages 17, 18. It is thus manifest that in the argument of the City no reliance at all is placed on the Act of 1877, or any act cited in Complainant's brief, save that under which the apportionments were made, as relieving the City from the asserted liability for the apportionments. Nor any where in defendant's argument or answer is it urged or contended that the Act of 1877, or any other act interfered with the taxes levied to pay the apportionments claimed in the bill; on the contrary the answer claims and the bill itself shows that far from any such interference these taxes, continued to be collected and applied after as before the Act of 1877, for the benefit of the warrant holders. Bill, paragraphs 7th, 12th and 14th, Record, page 10. The defense is: the City never owed the apportionments under the Acts of 1868 and 1869. The only issue of liability made by the bill is as to those apportionments, the payment of which as debts, the bill seeks. The asserted liability, under the argument and pleadings of the defendant, involves no conceivable question of constitutional law, but simply the construction of the Acts of 1868 and 1869. The Complainant can not maintain the constitutional question arises, or any element of impairment of contract exists, by reason of the argument or line of defense of the defendant. The question of liability to

pay the amount of the apportionments claimed by the bill, is met by the defence having no relation whatever to the legislation of 1877 or 1880. It is by the insistence that defendant relies on those acts, that Complainant seeks to introduce the federal question.

The receivability of Metropolitan warrants and certificates for taxes due the City, is entirely distinct from the asserted liability of the City for the apportionments. It was for the years of the apportionments, the warrants and certificates were authorized to be tendered, i. e., the direction was they were to be received up to the amount of the annual apportionments. Act No. 44 of 1869, appendix page 9; Act of 1870, No. 41, appendix p. 10. The apportionments ceased with the Board itself by the Act of 1877. The last apportionment was in 1876. The bill claims the amount of the apportionments from 1868 to 1876. No where in this bill is the semblance of complaint of any refusal to receive these warrants and certificates for taxes. The bill claims no relief in respect to the tender of warrants and certificates. But in his brief, the Complainant cites the legislation of Louisiana as interfering with the receivability of these warrants.

His supposed wrong in this respect could not have operated any injury, or it is fair to infer, it would have been the subject of complaint in his bill. Instead, of seeking payment by the City of the apportionments, his demand would have been that the city officials be ordered to receive in payment of taxes and licenses, all Metropolitan Warrants and certificates. He discards that relief. He asks to be paid the amount of the apportionments, i. e. cash for the amount of the apportionments. That demand excludes the tender of the warrants. He cannot ask that the City pay the amount of the apportionments in cash, and also pay the apportionments by receiving Police warrants for all taxes and licences. That would be to seek double payment. The fact then, that the bill is not filed for any relief in respect to the receivability of warrants and certificates, and the relief sought excluding the tender of this Police Scrip for taxes is impressive. The frame of the bill and the relief it prays awaken grave doubts whether there is on the part of the Complainant, himself any appreciation of injury in respect to the tender of warrants. Now the Act No. 33 of 1874, section 4, appendix, page 17, had substituted cash payments of all the Police taxes instead of payments in warrants. Thereafter only police scrip of date prior to 1st January, 1874 could be tendered and only for taxes prior to

1874. The warrants and certificates held by Complainant it may be stated are all for 1874. The entire bulk of all the outstanding warrants and certificates $123,000 are all for the years 1874, 1875 and 1876 except the inconsiderable sum of $2,386. Original Record Circuit Court, pages 85, 86 to 91 Under the Act of 1874, all these warrants were to be paid in cash under the new system of cash collections for all police taxes. The change was doubtless, deemed beneficial by all the creditors. The bill hence, makes no complaint of the Act of 1874. The Act of 1874 acquiescied in by all, took away the receivability for taxes of the warrants and certificates issued after 1st January, 1874, and as to those issued prior to 1st January, 1874, they were receivable only, for taxes prior to that date So in 1877, the warrants and certificates save the insignificant extant amount of earlier dates, had ceased to be receivable for taxes and licenses. It is thus evident the Act of 1877, alone complained of in the bill operated no injury whatever. It is equally plain the warrant holders cared nothing about tendering warrants for taxes. Hence, when the bill was filed it was to claim payment in cash of the apportionments. That was the method of discharging the warrants the creditors desired, and *not* the tender of warrants and certificates The Act of 1877 then, took

away no appreciable right with respect to the tender of warrants. The law after 1874 gave police taxes levied for the years of the apportionments, i. e. from 1868 to 1876. The Act of 1877 left these tax levies in full force, and the bill concedes it. It does seem extraordinary under these circumstances for the other side to ask in respect to the second questions submitting the effect of this Act of 1877, that this Court shall give an affirmative answer, i. e that the Act of 1877 deprived Complainant of the right of tender of his warrants; a right which manifestly did not exist when the Act of 1877 was passed, and a right asserted in argument only, to give an appearance of jurisdiction but discarded by the bill itself. This is enough to eliminate the element of tender of these warrants as an element in this controversy. But it remains to show that the Constitution of the State of 1880, gave to all holders of all police warrants the right to pay in this police scrip all taxes for years prior to 1879. The Complainant's brief suggests that the Constitution does not mean Metropolitan warrants. It is submitted, it does. The Act No. 49 of 1880, appendix, p. 28, recognizes Metropolitan warrants as covered by the constitutional provision, but proposed to limit their receivability. No question in this respect has arisen

in Louisiana, probably, because no holder of warrants in recent years attached importance to the tender of warrants for these old taxes. But the Constitution is paramount to the Act No. 49, and is self acting. It gives, as is maintained in the original brief, more than any warrant holder could have asked under the original acts, and this provision was in full force when the bill was filed and is still in force. It fully redressed the wrong in respect to the tender of warrants if any injury whatever had ever been done by the Act of 1877, and this redress was made before any complaint, for none had ever been made, or is made by the bill. The supposed wrong is ideal.

In the Complainant's brief alluding to the acts No. 33 of 1874, act No. 35 of 1877, and the act No. 49 of 1880, it is said that defendant claims by demurrer, answer and argument, that if these laws impaired the remedy of the scrip holders, the act No. 49 of 1880 gave a new remedy. This passage from the brief, conveys the significance that defendant concedes an impairment, but claims the Act No. 49 of 1880 substituted other and adequate relief. That is *not* the answer or argument of defendant. The whole line of argument and of the defendant's answer is, that the police taxes, the

provision for payment of the warrants and certificates was never disturbed, and that as to the apportionments there never was any liability for them.

The condition supposed by the first question of a dissolved corporation leaving assets as well as debts, requiring some method of applying the assets to the payment of the debts, does not suggest to the mind any sort of controversy arising under the Constitution of the United States. As already stated, when the Act of 1877 was passed which is claimed to have introduced this condition, the provision required by law for the payment of the police warrants and certificates was already made, i.e. the police taxes had been levied. The act ended the Metropolitan Police system, and of course all future apportionments ceased; but the warrants and certificates being dependent for payment on the police taxes levied for the years of the apportionments, that provision was left intact. See the Act No. 74 of 1868, Sects. 27 and 29, app. to original brief, pp 2 and 3. See the Act No. 92 of 1869, Sections 25 and 27, appendix to original brief, pp. 7 and 8. It might be deemed implied by the Complainant's argument that there was a right under these acts to taxes for future years, but it will be

seen the act directed the levy of taxes only, for the years of the apportionments. It cannot therefore, be said that this act took away any provision in this respect. Again, if the apportionments ever were debts of the City, as Complainant undertakes to maintain, the Act of 1877 left them the debts of the City. The City of New Orleans, charged with collecting and applying these taxes to the payment of police expenses, was left to all intents and purposes, so far as creditors were concerned, the successor of the abolished Metropolitan Police Board, and there were ample remedies provided when the Act of 1877 was passed, and subsisting at all times since, to compel if necessary the collection and application of the police taxes by the City of New Orleans. In all these aspects of the Act of 1877, it is extremely difficult to see how any right of these warrant holders, is in the least disturbed. It is to be borne in mind, too, that the act was necessary legislation to change the police system of the City, a change dictated by the public good, necessarily requiring the repeal of the laws relating to the Metropolitan Police Force. This repeal is all that the Act of 1877 effected. Is it now to be said that this police legislation was prohibited by the Constitution of the United States, especially in view of the fact of the careful avoidance of any attempt in that legislation to

disturb anybody's rights? The additional phase of this first question, i. e. whether the Act of 1877 furnished any basis to these warrant holders for a suit in equity, hardly deserves discussion, least of all if the controversy does not arise under the Constitution, but this phase as well as the other aspects of the question, are discussed in defendant's original brief at pages 16 to 25.

The proposition presented by the second question, divested of all extraneous issues, relates to the effect of the Act of 1877 on the receivability of the warrants and certificates for certificates for taxes. To answer the question requires the consideration of the legislation on that subject. That review has been presented, i. e. of the Acts No. 44 of 1869, No. 41 of 1870, No. 33 of 1874, and other acts of the Constitution of 1880. These acts manifest, that no rights of these warrant holders were ever impaired by the Act of 1887 or by any other legislation. It is plain, too, that the Constitution of the State of 1880, appendix to original brief, page 31, made the most liberal provision for the holders of this police scrip, if ever prior to that Constitution, they had the vestige of complaint under the Act of 1877 or any other legislative act. The answer to this second question is also indicated with great impressiveness, by the fact, that the Complainant repudiates by his bill

the supposed right the impairment of which is suggested for consideration by the second question. It can hardly be expected that this Court will instruct that a contract has been impaired, in respect to which the Complainant himself does not claim relief.

In the argument of the third question submitting whether this suit should not be dismissed as brought by the assignee of choses in action against the prohibition in the judiciary act (25th Statutes, page 454), the Complainant insists he does not sue on choses in action. But surely, without the warrants and certificates he could not sue at all. In his prayer he asks for payment of these obligations. The choses in action must certainly be deemed the foundation of his suit, and the demand is for their payment. The decree obtained is, that the City shall pay Complainant the amount of these choses in action. Original record in Circuit Court of Appeals, pp. 136–141. It must appear a most refined distinction to urge that a suit necessarily, based on choses in action and which seeks and obtains their payment, is not by every conceivable test a suit to recover the contents of the warrants and certificates

The policy of the restriction is to prevent suits

in the Federal Courts by assignees whose assignors could not sue. 9th Wallace, p. 392. It seems to be conceded, that the suit could not be maintained if brought against the Metropolitan Police Board. In the view of this prohibition of the judiciary act, does it make any difference whether the suit of the assignee is against the maker of the paper, or some other party supposed to be liable. In either case the suit is by an assignee to recover the contents of choses in action, and cannot be maintained without the averment the assignor could have sued.

Certainly, the answer of the Complainant on this issue of jurisdiction, is not furnished by citing in his brief authorities exempting from the prohibition of jurisdiction, suits brought on judgments recovered on choses in action or suits by assignees to recover chattels, or suits by assignees to recover damages for wrongful acts. In all these classes of cases the suit is not on choses in action to recover their contents, i. e. their amount. Is it on these authorities this Court is expected to answer that a suit which would have no existence but for the choses in action, and which claims and results in a decree for their contents, is not a suit to recover their contents. The propositions presented by the 3rd question are fully discussed in defendant's original

brief, pages 31 et seq. It is difficult to see, how any other than an affirmative answer could be made to the third question.

In presenting the 4th question as to whether the City is liable under these Metropolitan Police Statutes beyond the Police taxes collected, the Complainant undertakes to maintain the City became a debtor for the amount of the apportionments. Municipal corporatons have no means of payment of the Police or other expenses, save taxes All this police legislation proceeds on this theory. The acts direct apportionments or estimates of the police expenses to be made by the Police Board, and following the apportionments is the direction to levy the Police taxes for the payment of the expenses, and to account for these taxes to the Police Board. Acts 1868, sections 27, 29, 30, appendix pages 2 and 3. Acts 1869, sections 25, 27, 28, appendix pages 7 and 8. Acts of 1874, section 2, page 15. Act No. 16 of 1875, appendix page 19. In one of the acts the expression occurs, the City shall pay *and* provide the means for payment of the apportionments. But in the body of the act, the provision is pay *or* provide the means, and this evidently refers to the tax levies directed by the acts. Act No. 94 of

1870, sec. 5th. All the act was designed to enforce was the prompt levy of the police taxes. The apportionments when made were to be notified, not as a demand for payment. Nothing of that kind is required by the language of the acts or by their spirit. The notification was to be followed by the levies then collections and payment of the taxes. The only payment required was of the taxes as collected, and to this end the most careful provision was made. The very last act on the subject emphases that the obligation of the City was simply and only to levy, collect and pay the taxes. Act No. 16 of 1875, Sects. 1, 2, 3. 4, 5, 6, et seq , app. pp. 19 to 24. This last act requires weekly settlements of taxes collected, and provides in any default in the settlements that the police tax bills shall be handed over to the police. These statutes from 1868 to 1877 give no support whatever to the proposition that the City was bound to pay the apportionments, but convey the impression the City was only to collect and pay over the police taxes. In the nature of things payment of the taxes was all that could be required, hence the authority to levy them.

The Complainant does not devote any attention to the fact that these apportionments were simply estimates of the police expenses. The acts so declare. As estimates they were grossly exaggerated. Can it be maintained that the City was

to be held for the amount of estimated expenses? That, too, when it is apparent the estimates were merely to supply the basis for the tax levies. That the estimates largely exceeded the expenses of the Board, is demonstrated by the huge balance of the apportionments, $940,000 against $200,000 alleged but really only $143,000 of total liabilities of the Board extant. Bill, pages 10 and 13. This view alone shows these estimates were not debts, as the bill seeks to maintain. Indeed, nobody dreamed of any such pretension untill this bill was filed. The suit by the Receiver in the State courts was followed by the decision that the City was liable for the taxes collected, and not even for the police taxes received but not paid over to the City by the defaulting sheriff. In other words, the view of the Supreme Court was, that the City was an agent to collect and pay over the police taxes, on the bills placed in the sheriff's hands, and the City having used due diligence to collect, was not responsible for the dishonest sheriff. Harrisson, Receiver, vs. New Orleans, 40th Annual, p. 599. This view of the Supreme Court will, it is presumed, harmonize with the conclusions this Court will reach from an examination of the acts—that the City is not bound for the estimates of police expenses—but liable only for the police taxes collected.

Against the asserted liability for these huge estimates it is also urged in Defendant's original brief that out of limited taxation the City had to provide for all the varied purposes of municipal government. Hence, there was of necessity the limitation that the police expenses should not exceed the just proportion of the taxes that, consistent with other items of municipal expenditure, could be allotted to support the police. The Complainant in his brief undertakes to affirm the taxing power of this City is unlimited. Unfortunate city, if this were so. His reliance is on Act No. 73 of 1872. At all times, under all Constitutions of Louisiana, the power of taxation of the City of New Orleans has been limited. Act No. 191 of 1850, sections 6, 7, 8, Sess. Acts, pp. 129, 130; Act No. 93 of 1856, Sess. Acts, p. 68; City Charter of 1870, Section 12, Par 20, app. pp. 12, 13. Lastly, the very act cited by the other side contains an express limitation of City taxation of 1¼ per cent for all City expenses, including *Police*. The section cited by the other side frees the City from any limitation in the laws of the State applicable to municipal corporations generally, but the special limitations applicable to the City is repeated in the Act of 1872 So this Act of 1872, held up by the other side to sustain unlimited taxation and monstrous apportionments, affirms that this Metropolitan Board had no power

to apportion for police expenses more than the pro rata of such expenses capable of being thus applied out of the maximum taxation of 1¼ per cent. The whole taxable property of this City was, say $120,000,000. The apportionment of this Board for police expenses should have been, say $300,000, annually, the measure indicated by the Act of 1877, app. p. 24. But in one year of the existence of this Board the apportionment would have [redacted] the entire 1¼ per cent. tax, and in [redacted] was grossly excessive. The limitation of taxation in previous legislation is not only unaffected by the Police Acts of 1868 and 1869, but for greater caution is repeated in the later act of 1872, and with direct reference to police taxes. Yet it is these illegal apportionments, intended only by law to exhibit approximative estimates, and which as estimates do not deserve the name, that the the argument of the other side insists shall be deemed debts of this City, This theory of liability is essential to the purposes of the combination under Benjamin's name, who appeared at the bar of the Circuit Court as the owners of the certificates, acquiring after the failure of the previous enterprize conducted in the name of Goldstein, but it is submitted the asserted liability can find no countenance in law.

The Complainant's brief alludes to Act No. 67 of 1884, as appropriating Police taxes. Of what pertinence is this suggestion, if it had any basis. This is not a suit to make the City liable for diverting the police taxes. The Complainant if he chooses can bring such a suit. That would affirm all that the defences maintain, that the City is liable only for taxes collected. When he brings that sort of a suit and abandons his present theory of liability for exaggerated estimates the City will have its defence. It may be observed, however, that the Act No. 67 of 1884 does not appropriate the police taxes or the school taxes. It appropriates the uncollected taxes levied by the City of New Orleans for its ordinary municipal obligations, and applies these uncollected taxes to the payment of what is called the floating debt of the City. This pretension of liability is not in the case in any shape or form, but it tends to affirm that the only liability of the City of New Orleans arising from these Metropolitan Police taxes is for the police taxes collected.

This brief is devoted to a review of such points as seem to deserve attention in the brief for Complainant. In the original brief of the defendant there is a full discussion of the questions, and

to that brief, in connection with this, this Court is respectfully referred. It is believed that on examination it will be perfectly clear to this Court that the negative answer should be given to the first the second and fourth questions, and it will be found equally clear that the third question should be answered in the affirmative.

Respectfully submitted.

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For Defendant.